Supreme Court, U.S.
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No. 07-362

In The
Supreme Court of the United States

TEEN RANCH, INC., MATTHEW KOCH and MITCHELL KOSTER,

Petitioners,

v.

MARIANNE UDOW, MUSETTE MICHAEL and DEBORA BUCHANAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal and Michigan laws permit faith-based providers of social services to retain their religious character, allow recipients of those services to choose not to be served by such providers, and prohibit discrimination against faith-based providers on the basis of their religious character. Teen Ranch is a Christian residential program for troubled teens and has received referrals from Michigan for over 35 years. Claiming authority to do so under *Locke v. Davey,* 540 U.S. 712 (2003), the Defendants, then called the Michigan Family Independence Agency ("FIA"), disqualified Teen Ranch from referrals because it incorporates religious content into its program.

The questions presented are:

1. Did the Sixth Circuit err in holding, in conflict with *Locke*, that a state official can require a faith-based provider of social services, which is not a seminary, to forfeit its religious beliefs and practices before it can participate in a government program, when the applicable state and federal legislation have expressed a directly opposite intent?

2. Did the Sixth Circuit err in holding, in conflict with the Seventh Circuit's opinion in *Freedom From Religion Foundation v. McCallum*, 324 F.3d 880 (7th Cir. 2003), that an individual's right to veto a religious placement, and thus be assured a secular placement, is not sufficient to make placement a private choice for Establishment Clause purposes?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners state that they have no parent companies or non-wholly owned subsidiaries.

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OPINIONS BELOW

The decision of the United States District Court for the Western District of Michigan, Southern District, is reported at 389 F. Supp. 2d 827 (W.D. Mich. 2005), and attached at Appendix ("App.") 18. The panel decision of the Sixth Circuit affirming the District Court opinion is reported at 479 F.3d 403 (6th Cir. 2007), App. 1. The denial of Plaintiff's petition for rehearing and suggestion for rehearing en banc is not reported. App. 54.

JURISDICTION

The Sixth Circuit entered its order upholding the ruling of the District Court on January 17, 2007. Plaintiffs filed for en banc review, which was denied on June 15, 2007. App. 54. This Court has jurisdiction to review this decision under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United Sates and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The relevant federal law, 42 U.S.C. § 604a, states, in part:

> (b) Religious organizations
>
> The purpose of this section is to allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program described in subsection (a)(2) of this section, on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program.
>
> (c) Nondiscrimination against religious organizations

In the event a State exercises its authority under subsection (a) of this section, religious organizations are eligible, on the same basis as any other private organization, as contractors to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, under any program described in subsection (a)(2) of this section so long as the programs are implemented consistent with the Establishment Clause of the United States Constitution. Except as provided in subsection (k) of this section, neither the Federal Government nor a State receiving funds under such programs shall discriminate against an organization which is or applies to be a contractor to provide assistance, or which accepts certificates, vouchers, or other forms of disbursement, on the basis that the organization has a religious character.

(d) Religious character and freedom

(1) Religious organizations

A religious organization with a contract described in subsection (a)(1)(A) of this section, or which accepts certificates, vouchers, or other forms of disbursement under subsection (a)(1)(B) of this section, shall retain its independence from Federal, State, and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs.

(2) Additional safeguards

Neither the Federal Government nor a State shall require a religious organization to –

(A) alter its form of internal governance; or

(B) remove religious art, icons, scripture, or other symbols;

in order to be eligible to contract to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, funded under a program described in subsection (a)(2) of this section.

(e) Rights of beneficiaries of assistance

(1) In general

If an individual described in paragraph (2) has an objection to the religious character of the organization or institution from which the individual receives, or would receive, assistance funded under any program described in subsection (a)(2) of this section, the State in which the individual resides shall provide such individual (if otherwise eligible for such assistance) within a reasonable period of time after the date of such objection with assistance from an alternative provider that is accessible to the individual and the value of which is not less than the value of the assistance which the individual would have received from such organization.

(2) Individual described

An individual described in this paragraph is an individual who receives, applies for, or requests to apply for, assistance under a program described in subsection (a)(2) of this section.

Michigan Public Act 172 states:

(1) In contracting with faith-based organizations for mentoring or supportive services, and in all contracts for services, the department shall ensure that no funds provided directly to institutions or organizations to provide services and administer programs shall be used or expended for any sectarian activity, including sectarian worship, instruction, or proselytization.

(2) If an individual requests the service and has an objection to the religious character of the institution or organization from which the individual receives or would receive services or assistance, the department shall provide the individual within a reasonable time after the date of the objection with assistance or services and which are substantially the same as the service the individual would have received from the organization.

(3) The department shall ensure that faith-based organizations are able to apply and compete for services, programs, or contracts that they are qualified and suitable to fulfill. The department shall not disqualify faith-based organizations solely on the basis of the

religious nature of their organization or their guiding principles or statements of faith.

(4) The department shall follow guidelines related to faith-based involvement established in section 104 of title I of the personal responsibility and work opportunity reconciliation act of 1996, Public Law 104-193, 42 U.S.C. § 604a.

2003 Mich. Pub. Acts 775.

STATEMENT OF THE CASE

A. Facts

1. History of Federal and State Laws Regulating Michigan's Residential Care Program

In 1996, Congress enacted, and President Clinton signed into law, significant "Charitable Choice" legislation. 42 U.S.C. § 604a ("The Federal Law"). The Federal Law's stated intent is to permit states to contract with faith-based organizations ("FBOs") to provide various social services without requiring the organizations to compromise their religious character. 42 U.S.C. § 604a(b). This character specifically includes an FBO's right to control the "practice and expression of its religious beliefs." 42 U.S.C. § 604a(d)(1).

To comply with the Establishment Clause, the Federal Law grants recipients of state-funded support the right to refuse placement with FBOs to

which they have a conscientious objection, and to demand re-placement should they find themselves at an FBO to which they object. 42 U.S.C. § 604a(e)(1). It also prohibits states from discriminating against religious organizations on the basis of their "religious character," as defined above. 42 U.S.C. §§ 604a(c) and (d)(1).

Each year since 2001, Michigan has expressly incorporated the Federal Law by reference in each of its annual appropriation statutes for the Michigan Family Independence Agency ("FIA"). These appropriation statutes are collectively called "the Public Act." The Public Act states:

> The department shall follow guidelines related to faith-based involvement established in section 104 of title I of the personal responsibility and work opportunity reconciliation act of 1996, Public Law 104-193, 42 U.S.C. § 604a.

App. 8.

Like the Federal Law, the Public Act also provides an opt-out clause for any ward who "has an objection to the religious character of the institution or organization from which the individual receives or would receive services or assistance. . . ." *See id.* at (2). Consequently, if a state official recommends placing a ward at a religious facility, such as Teen Ranch, then the ward has the statutory right to reject that placement, both before and during the ward's stay at Teen Ranch.

2. Facts Relating to the FIA's Residential Care Program

The FIA is responsible to provide care and supervision for children who have been committed to or placed in its care through state courts. Each ward is assigned both a caseworker and a lawyer/guardian ad litem ("GAL") to counsel the ward and advocate for the ward. The FIA contracts with 96 private organizations to provide residential youth rehabilitation services ("youth services"). At least 35 of the providers are faith-based organizations. But only Teen Ranch included religious activities in its program. All programs are essentially round the clock in nature. Hence, there is no "separate time and place" available to sequester religious activities. All are paid on a per diem, per capita basis, as opposed to block grants. Hence, they are paid only for the services they perform for wards who are housed with them.

FIA uses a computerized grid to determine what FIA claims is the "best" placement for the child. The computer system considers the child's history and other information to identify the treatment needs, and generates a series of proposed placements "ranked" in descending order of preference. No evidence has been put forward to establish that any second or third choice is substantially inferior to the computer's first choice. Moreover, the FIA does not track, nor does the computer consider, the effectiveness of the various facilities, nor their relative economy. Religion is not a factor in the computerized grid, nor the placement process. FIA is not required to

insist on the computer's first choice of placements for their wards. Hence, this entire procedure is essentially voluntary on FIA's part.

3. History of Teen Ranch and its Program

Teen Ranch has provided licensed residential services for delinquent, neglected, abused, and emotionally troubled youth between the ages of 11 and 17 since 1966. It has openly advertised its religious orientation and has unapologetically incorporated religious programming into the services it provides. Teen Ranch, by Board approved policy, does not mandate participation in any religious-themed activity.

4. FIA's Imposition of a Moratorium Upon Teen Ranch.

In October 2003, FIA conducted a "Quality Assurance Review" ("QAR") of Teen Ranch. The QAR unveiled areas of alleged noncompliance, of which all but the religious program at Teen Ranch were resolved by the end of 2003, and are thus irrelevant. On November 6, the FIA sent a letter to Teen Ranch outlining "violations of particular significance" and issued a moratorium on further placements. Among these "violations" was the incorporation of religious activity in the Teen Ranch program.[1] On December

[1] The QAR also included unsubstantiated allegations that Teen Ranch coerced roughly ten wards into participating in

(Continued on following page)

16, FIA sent a letter to Teen Ranch, stating, "It is not only improper to force youth to participate in religious practices, but it is also improper to incorporate religious teachings into the on-going daily activities of youth and their treatment plans." App. 4. On December 17, a meeting was held between the parties where Teen Ranch maintained its position of incorporating its religious beliefs into its youth services on a voluntary basis. In response to FIA's request to discontinue all religious activities, Teen Ranch issued the following statement:

> The mission statement of Teen Ranch states, "providing hope to young people and families through life changing relationships and experiences from a Christian perspective." This mission, and our interpretation of this mission, will not change, be sacrificed, nor will it be compromised.
>
> Teen Ranch, as policy, does not "force" youth to attend religious services, although it is encouraged and we believe to be part of an effective treatment program. Alternatives are provided for the children who wish not to attend religious services, such as a personal academic study time (if desired), letter writing

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religious activities. At no time in the next six months did FIA remove any of the allegedly offended wards, notify them or their caseworkers and lawyer/GALs of their statutory rights to demand relocation to a secular program, or tell Teen Ranch which wards objected to the religious programming. Instead, FIA demanded the removal of all the religious programming at Teen Ranch.

> home, recreational time in the gymnasium, or watch television until the other youth return home.
>
> However, incorporating religious teachings into on-going daily activities of youth and their treatment plans touches at the core of why we were founded, why we are here today, and why we will continue to include such programming for children in our care.

App. 5.

On January 9, the FIA told Teen Ranch that faith-based "providers receiving federal funding may not incorporate sectarian worship, instruction, or proselytization into the daily treatment and service plan activities," (App. 6) and, concluded "if Teen Ranch is unwilling to modify its current practices regarding the imposition of its religious beliefs into the daily treatment and service plan activities, FIA is unable to approve the corrective action plan and rescind the moratorium." App. 6.

5. Teen Ranch Efforts to Avoid Litigation via Compliance with State and Federal Law, and FIA's Temporary Compliance with the Law

On several occasions, Teen Ranch pled with FIA to follow the above referenced laws and permit Teen Ranch to retain its religious character and still participate in the state's residential care program. On

January 21, 2004, Teen Ranch sent FIA a letter informing them of the Public Act and the Federal Law, and requested they abide by the laws. App. 6, 56. On January 30, Teen Ranch representatives met with FIA, presented them with the Public Act and the Federal Law, and invited FIA to join Teen Ranch in obeying these statutes. Teen Ranch even gave FIA disclosure documents detailing Teen Ranch's religious character to give to potential placements, and implement the federal and state "opt-out" rights.

On February 20, 2004, Teen Ranch filed suit and requested a TRO. On February 23, Teen Ranch filed a Motion for Preliminary Injunction. On February 23, 2004, in response to Teen Ranch's Motion for TRO and Preliminary Injunction, FIA lifted the moratorium and temporarily implemented the statutory practices Teen Ranch had urged at the January 31, 2004 meeting. App. 7. Wards were given notice of Teen Ranch's religious character and advised of their right to refuse placement at Teen Ranch. Two new youth agreed to enroll at Teen Ranch in the next month. In early April, 2004, after the District Court denied Teen Ranch a Preliminary Injunction, FIA reimposed the moratorium, and discontinued the above noted practice.

B. The District Court Opinion

The District Court correctly identified the controlling question in this case as "whether the ability of youth to opt out of the Teen Ranch program pursuant

to § 220(2) of the Public Act based on its religious character gives the youth true private choice so as to make the funding of the religious programs at Teen Ranch indirect rather than direct." *Teen Ranch*, 389 F. Supp. 2d at 834-35, App. 33. The District Court was "aware of no case that has examined the issue of whether an opt-out provision is sufficient to constitute 'true private choice.'" *Id.* at 836, App. 36. The court also mentioned that the wards' youth prevented them from exercising private choice involving religious matters. *See id.* at 837, App. 39. The District Court then held that FIA could not place youth at Teen Ranch without violating the Establishment Clause. *Id.*

Upon concluding that private choice did not exist, the District Court quickly dispensed with Teen Ranch's other claims. *See Teen Ranch*, 389 F. Supp. 2d at 838-42, App. 40-52. It relied upon *Locke* in concluding that FIA had the discretion to refuse to contract with an FBO until it purged itself of its religious character. *Teen Ranch,* 389 F. Supp. 2d at 831, App. 24. The court neither noted nor addressed the fact that both Congress and the Michigan Legislature expressed the opposite intent, i.e., to permit faith-based organizations to participate in residential care programs without sacrificing their religious character. Moreover, the court failed to note that *Locke* was, by the majority opinion's own words, limited to "the religious training of clergy." 540 U.S. at 722, n. 5. No one contends that Teen Ranch is a seminary.

C. The Sixth Circuit Opinion

The Sixth Circuit essentially adopted the District Court's opinion. "[T]he district court identified the applicable law at issue – § 220 of the Michigan State Appropriations Bill, 2003 P.A., 172 ('Public Act') – which governs contracts between the FIA and faith-based organizations and also instructs the FIA to follow the guidelines set forth in 42 U.S.C. § 604a." *Teen Ranch v. Udow,* 479 F.3d 403, 408 (6th Cir. 2007), App. 7-8. "The district court properly recognized that this case turns on whether the FIA's funding of Teen Ranch is indirect, rather than direct, because the funding is 'a result of the genuine and independent choices of private individuals.'" *Id.* at 408-409, App. 9-10, *quoting Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002).

After reiterating the District Court's opinion, the Sixth Circuit stated,

> [W]e believe that the district court was correct in reaching its conclusions and granting summary judgment in favor of the FIA. For the same reasons identified by the district court, we conclude that the opt out provision of the Public Act did not provide the children placed in the care of the FIA with "true private choice." Likewise, after carefully considering the applicable law, we also reject all five of Teen Ranch's arguments for the reasons articulated by the district court.

Teen Ranch, 479 F.3d at 410 (emphasis added), App. 13-14.

REASONS FOR GRANTING THE PETITION

This Court should grant review to enforce the proper understanding of *Locke*, to settle a circuit split between the Sixth and Seventh Circuits as to whether an "opt-out" is private choice, and to affirm that, consistent with this Court's holding in *Zelman,* adults can exercise private choice for minors for whom they are legally responsible.

In *Locke*, the Supreme Court upheld a Washington statute that prohibited state scholarships being issued to students studying for the clergy. The majority opinion limited the holding to state funding of *clerical* studies. The Court cautioned that the opinion should not be read to give the states broad discretion to discriminate based on their "philosophical preferences." *See* 540 U.S. 722, n. 5.

The Sixth Circuit erroneously expanded the holding in *Locke* well beyond these stated limits and, in so doing, held that state bureaucrats may disregard federal and state law and form First Amendment public policy based solely on personal preference. The decision below essentially grants bureaucrats virtually unlimited "play in the joints" to discriminate against religious organizations at will.

In so extending *Locke*, the Sixth Circuit trampled on the Free Exercise Clause. Prior to *Locke*, this Court's long-standing jurisprudence forbade targeting religious beliefs for negative discriminatory treatment. *See Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990);

Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987) (requiring students to choose between their religious beliefs and receiving a government benefit); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963); *McDaniel v. Paty*, 435 U.S. 618, 626 (1978); and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). *Locke* did not purport to disturb this settled norm, yet that is precisely what the court below has done.

In addition, this Court should settle the conflict between the Sixth and the Seventh Circuits as to whether an "opt-out" creates private choice. In *Freedom from Religion Foundation v. McCallum*, 324 F.3d 880 (7th Cir. 2003), a Wisconsin state agency placed parolees in a Christian half-way house that incorporated religion into its treatment program. As in this case, the parolee had the right to refuse the placement on religious grounds and demand an alternative. The Seventh Circuit affirmed that this right to reject the suggested placement created true private choice, and thus the Establishment Clause was satisfied (i.e., the aid to religion was "indirect"). *Id.* at 882.

The Sixth Circuit ignored *McCallum* and held the polar opposite. This Court should settle the conflict and rule that both an opt-out and a selection initiated by the individual achieve the same end. In both instances the individual cannot be coerced to accept religious programming, and the Establishment

Clause is satisfied. The method of assuring neutrality encoded in the Federal Law and Public Act, consistent with the plurality opinion in *Mitchell v. Helms*, 530 U.S. 793 (2000), is to provide a system of private choice so that no government dollars go to a religious organization except in accordance with the private choice of an individual. An opt-out provision satisfies this concern.

ARGUMENT

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH *LOCKE V. DAVEY* AND ESTABLISHED FREE EXERCISE JURISPRUDENCE.

FIA and both courts erroneously extended *Locke* far beyond and contrary to its stated limits and underlying rationale.

A. *Locke v. Davey*

In *Locke*, this Court upheld a Washington statute that prohibited state scholarships for students studying to become clergy. *See* 540 U.S. at 725. The holding was explicitly limited to the issue of funding for "the religious training of clergy." *Id.* at 722, n. 5, 722-24. The Court explained that this narrow decision reflected long-standing historical concerns over public funding of the clergy. It did not apply to general religious studies. In fact, the program in question "permitt[ed] students to attend pervasively religious schools, so long as they [were] accredited." *Id.* at 724.

In addition, this Court did not grant even state legislatures, much less state employees, permission to discriminate against religion based on their own "philosophical preferences." *See id.* at 722 n. 5. Nowhere were the "philosophical preferences" of state bureaucrats indulged or endorsed as legitimate "play in the joints." *Id.*

> Justice Scalia notes that the State's "philosophical preference" to protect individual conscience is potentially without limit, see *post,* at 1318; however **the only interest at issue here is the State's interest in not funding the religious training of clergy. Nothing in our opinion suggests that the State may justify any interest that its "philosophical preference" commands.**

Id. at 722 n. 5 (emphasis added).

Locke was thus fully consonant with this Court's earlier teaching expressed in *Zorach v. Clausen,* 343 U.S. 306 (1952), where Justice Douglas wrote for the majority:

> We sponsor an attitude on the part of government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs it follows the best of our traditions.

343 U.S. at 313-14; *see also Walz v. Tax Commission of City of New York,* 397 U.S. 664 (1970) (quoting the *Zorach* excerpt and using the phrase "play in the joints").

In *Locke,* the Court reaffirmed that governments have some "play in the joints" between the Free Exercise and Establishment Clauses. However, this Court was careful to clearly identify the unique circumstances at work in *Locke*. Both the FIA and the Sixth Circuit completely disregarded this cautionary limitation.

B. The Sixth Circuit Improperly Expanded *Locke*.

The Sixth Circuit cited *Locke* to excuse FIA's discrimination. As a result, the court below allowed state employees to override the express will of the state legislature, in an area that no one contends involves seminary training or some comparable historically rooted exclusion.

Two weeks after *Locke* was issued, FIA cited it to the District Court as justification for its discrimination against Teen Ranch. However, FIA's actions run directly contrary to the requirements of the Federal Law and Public Act, and represent, if anything, a species of "bureaucratic veto" nowhere endorsed in *Locke*. The Federal Law explicitly prohibits discrimination against religious organizations in contracting for social services programs. 42 U.S.C. § 604a(c). It permits FBOs to participate in publicly funded social

service programs without compromising their religious character.

> The purpose of this section is to allow states to contract with religious organizations . . . without impairing the religious character of such organizations.

42 U.S.C. § 604a(d)(1).

The law defines "religious character" to include the organization's "practice and expression of its religious beliefs." 42 U.S.C. § 604a(d)(1). The State of Michigan adopted the Federal law by reference, and directed FIA to implement these guidelines in all their dealings with faith-based organizations. *See Teen Ranch*, 479 F.3d at 408 (quoting the Public Act, section 220(4)), App. 8.

The philosophical preferences upon which FIA has acted are clearly contrary to these statutory policies. Debora Buchanan, the Manager for the Purchased Care Division for FIA, testified:

> My position right now today is that it is improper for the State of Michigan to contract with a provider who incorporates religious beliefs, practices, et cetera. . . .

App. 71.

Hence, Congress and Michigan gave FIA specific instructions to include openly religious organizations in eligibility for state contracts. *Contrary to Locke,* the bureaucrats in FIA simply disagreed.

It is uncontested that Teen Ranch confers no clerical degrees, nor is it in any way a seminary. While Teen Ranch is a religious organization, *Locke* does not endorse discrimination against even "pervasively religious" programs. 540 U.S. at 724; *see also Mitchell,* 530 U.S. at 809-10. Consequently, the Sixth Circuit misread *Locke*.

C. Without *Locke* as a Defense, the FIA's Actions Violate the Free Exercise Clause.

Absent the erroneously claimed endorsement of *Locke,* the actions of FIA plainly violate this Court's established jurisprudence regarding the Free Exercise Clause. This Court has never upheld state action that specifically targets religious beliefs for disparate treatment. *See Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963); *McDaniel v. Paty*, 435 U.S. 618, 626 (1978); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). Yet, this is exactly what FIA did to Teen Ranch, specifically targeting Teen Ranch's religious beliefs and mandating they cease practicing their religious beliefs before they can participate in the state's youth services program. App. 6.

II. THE SIXTH CIRCUIT'S OPINION ON PRIVATE CHOICE CONFLICTS WITH THE SEVENTH CIRCUIT'S OPINION IN *MCCALLUM*.

FIA and the lower court opinion contend that the statutes in question fail to accord private choice. The Sixth Circuit found that private choice was lacking on two counts. First, the court below held that the rights to reject placement at an FBO, and to demand relocation, fail to constitute genuine private choice, since the ward does not, as it were, "choose from a menu of options." This holding contradicts the Seventh Circuit in *Freedom from Religion Foundation, Inc. v. McCallum*, 324 F.3d 880 (7th Cir. 2003). Second, the court below held that the wards, as minors, were too young to exercise private choice, notwithstanding that each ward is assisted by parents and assigned a caseworker and lawyer/GAL as a matter of law to assist them. This holding runs counter to *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002).

A. Conflict with the Seventh Circuit's Decision in *McCallum*

In 2003, the Seventh Circuit held that a parolee's right to reject a parole officer's selection of a Christian half-way house for his parole house sufficed to create private choice. *Freedom from Religion Foundation, Inc. v. McCallum*, 324 F.3d 880 (7th Cir. 2003). On all relevant factual points, this case is indistinguishable from *McCallum*.

In *McCallum,* parolees were clearly under the jurisdiction of the state (Wisconsin). A state agent would review the parolee's *dossier* and personally select a halfway house to help transition the parolee back into society. The Seventh Circuit described the process as follows:

> If a convicted criminal is out on parole (or probation, but we need to discuss that separately) and living in Milwaukee and he violates the terms of parole, his parole officer may offer him, as an alternative to being sent back to prison, enrollment in one of several halfway houses. The officer can recommend a specific halfway house – the one he thinks best for the particular offender – but the offender is free to choose one of the others.

Id. at 881.

One of the facilities officers suggested was Faith Works, a Christian halfway house that incorporated Bible reading and similar devotional exercises in their daily programs. If the parole officer selected Faith Works, the parolee was entitled to reject placement if he/she objected to the religious programming. *See Freedom from Religion Foundation, Inc. v. McCallum*, 214 F. Supp. 2d 905, 910-11 (W.D. Wis. 2002), *aff'd*, 324 F.3d 880 (7th Cir. 2003). In such a case, the agent was required to find a suitable secular house. The halfway houses, including Faith Works, were compensated under a per diem, per capita contract with the state, and were, in effect, paid only

for the specific parolees they served, while they served them.

The Seventh Circuit held that the parolees' right to reject a placement was sufficient to create private choice.

> The choice must be private, to provide insulating material between government and religion. It *is* private; it is the offender's choice.

Id. at 882. *See also Freedom from Religion Foundation, Inc. v. McCallum*, 179 F. Supp. 2d 950, 971 (W.D. Wis. 2002), *on reconsideration in part*, 214 F. Supp. 2d 905, 910-11 (W.D. Wis. 2002), *aff'd*, 324 F.3d 880 (7th Cir. 2003) (explaining in detail the opt-out system permitting parolees to reject a placement to a religious half-way house initially suggested by the parole officer).

Thus, the Seventh Circuit found the state's placement process to be equivalent to the voucher program endorsed by this Court in *Zelman,* and concluded "there is no difference" between the practices of the Wisconsin correctional officers and the voucher system in *Zelman. See* 324 F.3d at 882. It held that the right to reject an undesired placement in a religious program is indistinguishable from the individual selecting from a "menu" without input from a state agent. Both are private choice.

In this case, the wards are under the jurisdiction of FIA, just as the Wisconsin parolees were under the jurisdiction of their state. In both, one facility is

available that incorporates religious activities in its program, and many others do not. In both, the state agent can or does initiate the placement process. In Wisconsin, the agency permits the parolee to reject the religious placement and choose another. In the present case, the Federal Law and Public Act both require that a ward who objects to Teen Ranch's religious character must be reassigned or relocated, yielding a placement that does not incorporate religion. 42 U.S.C. § 604a(e)(1); Public Act Section 220(2) and (4), App. 8-9.

Contrary to the Seventh Circuit, the Sixth Circuit held that the option to reject an unwanted placement did not suffice to create private choice. Rather, it endorsed the holding that, in order for true private choice to exist, the ward must select from a "menu" of choices. *See Teen Ranch*, 389 F. Supp. 2d at 836, App. 36 ("Although the children have the ability to opt out of a religious program, they do not have the ability to choose or reject a religious program from a menu of secular and religious programs").

B. The Seventh Circuit's Decision is More Consistent with Supreme Court Decisions.

The apparent rationale for the Sixth Circuit's decision is the ephemeral distinction between an individual affirmatively "selecting from a menu," versus an individual rejecting an unwanted placement. But as the Seventh Circuit held in *McCallum*,

there is no constitutional difference. By either means, any individual who desires a purely secular placement is guaranteed one. He either chooses it, or rejects a religious alternative. By either means, the recipient has the power to reject an unwanted religious placement. His placement coincides with his personal desire, and is, therefore, a genuine private choice. The Establishment Clause is satisfied. The state is neutral. No governmental endorsement of religion occurs.

The D.C. Circuit put the point succinctly in *American Jewish Federation v. Corporation for National and Community Service,* 399 F.3d 351 (D.C. Cir. 2005). When confronted with a similar objection that a majority of placements in a particular program were religious, and that the "choices" were "limited," the D.C. Circuit held:

> Of course the number of such opportunities is "limited." It could scarcely be unlimited. **The important points are** (1) there are a numerous AmeriCorps teaching positions in public and private secular schools; and (2) that there is no evidence of any participant who wanted to teach in a secular school, **but was impermissibly channeled** to a religious school.

399 F.3d at 358 (emphasis added).

To paraphrase the D.C. Circuit, it is immaterial whether the individual's state employed "waiter" gets to suggest an entree from a "menu." It only matters

that the waiter may not demand the individual accept his suggestion. Whether the absence of coercion is accomplished by the state-employed "waiter" standing mute or, as in our case, the applicable statutes requiring him to defer to the individual's objection, is, from the perspective of the Establishment Clause, immaterial. The *individual's* choice, the *private* choice, prevails in either event. The Seventh Circuit, in *McCallum,* reflects this logic. The Sixth Circuit, in this case, denies it. The essence of private choice is the absence of government coercion, not the mere formalism of who initiates a conversation leading to the placement. *See also McCallum*, 324 F.3d at 883 ("The plaintiffs argue that by recommending Faith Works to some offenders, parole officers steer the offenders to a religious program and by doing so provide governmental support to religion. The implications of the argument are unacceptable.")

Hence, just as *Mitchell* dispensed with the immaterial formalism of whether a voucher check was made out to the school or was endorsed over to the school by the student or his parents, it is immaterial in the context of private choice whether the placement results from an individual "choosing from a menu" or rejecting unwanted alternatives until one meets with his approval. *See* 530 U.S. at 793. In either event, it is the choice of the individual, not the will of the state, that determines the placement. This is private choice.

C. Prohibiting Minors from Exercising Private Choice through Adult Proxies Conflicts with *Zelman*.

The final basis upon which the Sixth Circuit ruled was the minority of the wards. The Sixth Circuit upheld the District Court ruling in that:

> **Regardless of whether state wards are particularly vulnerable, they are children.** The Court believes this fact cannot be ignored as the Court considers whether an opt-out provision is sufficient to make the ward's choice a "true private choice."

Teen Ranch, 389 F. Supp. 2d at 835, App. 34.

The lower courts cited to this Court's school prayer cases and, in particular, to language citing "heightened concerns" appropriate to the youth of school children. The courts did not discuss or opine as to why, given that each ward is attended to by a caseworker, a lawyer and, frequently, their parents, the private choice could not be exercised through any of these trained adults' mediation.

The court's holding at least implies that private choice may not be exercised by or for minors. This contradicts the decision in *Zelman* and is a complete misapplication of school prayer jurisprudence.

Zelman sustained a voucher program for parochial schools against an Establishment Clause challenge by finding that vouchers are an exercise of private choice. *See* 536 U.S. at 653. Obviously, the

students involved who would be attending the classes were minors enrolled in grades K-12. All or substantially all of them were enrolled in schools chosen for them by their parents or legal guardians. After reviewing this Court's "consistent and unbroken" chain of decisions on "true private choice," this Court reframed the issue in terms that inevitably dispel the notion that private choice cannot be exercised by youth or on behalf of youth by responsible adults.

> The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools.

Id. at 655-56.

Obviously, if private choice cannot be exercised by or for youths through the counsel and intercession of responsible adults, it would have been impossible for this Court to frame the issue as it did and to reach its ultimate holding:

> In sum, the Ohio program . . . permits such individuals to exercise genuine private choice among options public and private, secular and religious. The program **is therefore a program of true private choice**.

Id. at 662 (emphasis added).

With that, this Court reversed the Sixth Circuit and approved the Cleveland voucher program. Hence, *Zelman* decisively dispels the notion that private choice is impossible where the program beneficiary is a minor.

Zelman also illustrates the error of the lower court's invocation of the school prayer cases. Indeed, those decisions themselves illustrate their complete irrelevancy to private choice analysis. In none of these decisions did the term "private choice" even appear. In *Zelman,* none of these decisions were cited by the majority, and no justice writing a dissent argued that, owing to these decisions, private choice could not be exercised by or for minors by responsible adults. Hence, it is clear that considerations informing school prayer cases and the "heightened concerns" relative to youth cited by the Sixth Circuit are inapposite when considering a case of private choice.

Private choice can readily be exercised by youths, aided by responsible adults. In this case, it is uncontested that each ward has numerous trained adults assigned who are capable of serving this purpose. App. 20. No one has proffered any evidence to the contrary.

Moreover, the very nature of private choice demonstrates the irrelevance of the "heightened concerns" addressed in the school prayer cases. In all school prayer cases, a common fact was that, despite the alleged "voluntariness" of the religious observances under attack, it remained true that the objecting youth would remain enrolled in the same school, subject to questioning, peer pressure, and the like. Under the statutes in question here, the unwilling youth is relieved of the entire unwanted environment. The youth goes elsewhere, to a secular facility. Given that no other program in Michigan includes religious

activities, the objecting ward is guaranteed to be placed at an organization without such activities. Even if more facilities began to include religious features, the statutory rights are unlimited, such that the availability of a secular environment remains an absolute guarantee. Hence, unlike all the school prayer cases, Michigan wards who object to Teen Ranch's religiosity need never be at Teen Ranch, nor be subjected to any allegedly "coercive environment" that might exist there. Indeed, minors in this case actually enjoy *greater* free choice than the children in *Zelman*, who had no legal right to veto their parents' choices.

Consequently, the Sixth Circuit's final basis for denying Teen ranch the relief it seeks, the "youth exception" is, again, meritless.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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479 F.3d 403

United States Court of Appeals, Sixth Circuit.

TEEN RANCH, INC., Matthew Koch, and Mitchell Koster, Plaintiffs-Appellants,

v.

Marianne UDOW, Musette Michael, and Debora Buchanan, Defendants-Appellees.

No. 05-2371.

Argued Oct. 25, 2006.

Decided and Filed Jan. 17, 2007.*

ARGUED: Joel L. Oster, Alliance Defense Fund, Leawood, KS, for Appellants. Joel D. McGormley, Michigan Department of Attorney General, Lansing, MI, for Appellees. **ON BRIEF:** Joel L. Oster, Kevin H. Theriot, Alliance Defense Fund, Leawood, KS, Gary McCaleb, Alliance Defense Fund, Scottsdale, AZ, for Appellants. Joel D. McGormley, Michigan Department of Attorney General, Lansing, MI, for Appellees. Daniel Mach, American Civil Liberties Union, Washington, DC, Kary L. Moss, American Civil Liberties Union, Detroit, MI, David S. Prohofsy, Skadden, Arps, Slate, Meagher & Flom, Chicago, IL, for Amici Curiae.

Before: KEITH, COLE, Circuit Judges; STEEH, District Judge.**

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* This decision was originally issued as an "unpublished decision" filed on January 17, 2007. On January 31, 2007, the court designated the opinion as one recommended for full-text publication.

DAMON J. KEITH, Circuit Judge.

Plaintiffs-Appellants, collectively referred to as "Teen Ranch,"[1] appeal the district court's grant of summary judgement in favor of Defendants-Appellees, collectively referred to as the Family Independence Agency ("FIA"),[2] on Teen Ranch's constitutional and statutory religious discrimination claims. For the following reasons, we AFFIRM the district court's grant of summary judgement.

I.

The FIA, a department of the Michigan state government, is responsible for providing care and supervision to abused, neglected, and delinquent children who have been committed to or placed in its care through state courts. The FIA is authorized to contract with private organizations to provide placement services. The FIA contracts with 96 private child-care agencies to provide residential services to youth for stays averaging four to twelve months. At

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** The Honorable George Caram Steeh, United States District Court for the Eastern District of Michigan, sitting by designation.

[1] Plaintiffs-Appellants are Teen Ranch, Inc.; Matthew Koch, its Chief Executive Officer; and Mitchell Koster, its Chief Operating Officer.

[2] Defendants-Appellees are Marianne Udow, Director of the FIA; Musette Michael, Interim Director of the FIA; and Debora Buchanan, Manager of the Purchased Care Division of the FIA.

least 35 of the providers are faith-based organizations.

Once a child is placed in the care of the FIA, a computerized grid is then used to determine the best placement for the child. The computer system considers the child's history, family history, any relevant psychological or psychiatric information, and other information identifying the child's treatment needs. The computer then selects a service provider that best matches the child's needs.

Teen Ranch, one of the 35 faith-based providers that contract with the FIA, is an organization that has provided licensed and residential services for delinquent, neglected, abused, and emotionally troubled youth between the ages of 11 and 17 since 1966. Teen Ranch has openly advertised its religious orientation, and has admittedly incorporated religious programming into the services it provides under the FIA contract. However, Teen Ranch maintains that participation in the religious programming is voluntary since its policy does not mandate participation in any religious activity, including church services. Specifically, its program involves voluntary prayers before meals, voluntary devotions during the week, voluntary church attendance, and voluntary discussions concerning the Christian faith between staff and the children.

Between October and November of 2003, the FIA conducted a "Quality Assurance Review" ("QAR") of the Teen Ranch program. The QAR unveiled several

areas of contract and policy noncompliance. Therefore, on November 6, 2003, the FIA, through Debora Buchanan ("Buchanan"), sent a letter to Teen Ranch outlining "violations of particular significance" and issuing a moratorium on further placements at Teen Ranch. The QAR also uncovered evidence, which was later confirmed, in the form of youth reports, interviews with residents, and Teen Ranch's brochure, that Teen Ranch coerced children into participating in religious activities. Thereafter, Teen Ranch's incorporation of religious practices into its programming became the FIA's chief concern.

On December 2, 2003, the FIA issued a "Quality Assurance Program Review Report" to Teen Ranch and requested, within 30 days, a "Quality Improvement Plan" addressing all of their concerns. Teen Ranch subsequently submitted a "Corrective Action Plan" ("CAP" or "plan"), and on December 16, 2003, Buchanan sent a letter responding to Teen Ranch's plan. In addition to detailing the areas of Teen Ranch's CAP that did not adequately ensure compliance, the letter also addressed Teen Ranch's representation that youth are not required to participate in religious programming. Buchanan stated, "It is not only improper to force youth to participate in religious practices, but it is also improper to incorporate religious teachings into the on-going daily activities of youth and their treatment plans." (J.A. at 251). On December 17, 2003, a meeting was held between the FIA and Teen Ranch where Teen Ranch continued to maintain its position of incorporating its religious

beliefs into treatment programming. At the conclusion of that meeting, and in response to the FIA's request for an amended CAP concerning the religious practices, Teen Ranch issued the following statement, in pertinent part:

> The mission statement of Teen Ranch states, "*providing hope to young people and families through life changing relationships and experiences from a Christian perspective.*" This mission, and our interpretation of this mission, will not change, be sacrificed, nor will it be compromised.
>
> Teen Ranch, as policy, does not "force" youth to attend religious services, although it is encouraged and we believe to be part of an effective treatment program. Alternatives are provided for the children who wish not to attend religious services, such as a personal academic study time (if desired), letter writing home [sic], recreational time in the gymnasium, or watch [sic] television until the other youth return home.
>
> However, incorporating religious teachings into on-going daily activities of youth and their treatment plans touches at the core of why we were founded, why we are here today, and why we will continue to include such programming for children in our care.

(J.A. at 640) (emphasis in original).

By early January 2004, Teen Ranch had submitted an amended CAP that addressed all of the violations identified by the FIA, with the exception of the incorporation of religious practices in its programming. Accordingly, on January 9, 2004, the FIA informed Teen Ranch, by letter, that while it supports the important role that faith-based organizations play in providing quality services to Michigan youth and families, "providers receiving federal funding may not incorporate sectarian worship, instruction, or proselytization into the daily treatment and service plan activities." (J.A. at 252). Furthermore, it stated that "[t]he incorporation of faith specific tenets into treatment is not permitted by state and federal law[,]" and "if Teen Ranch is unwilling to modify its current practices regarding the imposition of its religious beliefs into the daily treatment and service plan activities, [the] FIA is unable to approve the corrective action plan and rescind the moratorium." (J.A. at 252).

On January 21, 2004, Teen Ranch, submitting federal and state law that purportedly supports its claim, issued a letter detailing its position and denying allegations of coerced religious participation. On January 30, 2004, the FIA and Teen Ranch met again but to no avail. The parties continued their discussion; however, a solution regarding the incorporation of religious programming was not reached. Ultimately, on February 20, 2004, Teen Ranch filed suit pursuant to 42 U.S.C. § 1983, alleging violations of: (1) the Free Exercise Clause of the First Amendment;

(2) the Free Speech Clause of the First Amendment; (3) the Due Process Clause of the Fourteenth Amendment; (4) the Equal Protection Clause of the Fourteenth Amendment; and (5) 42 U.S.C. § 604a.

On February 23, 2004, Teen Ranch moved for a temporary restraining order, which was denied on the same day. Thereafter, Teen Ranch moved for a preliminary injunction. At the advice of counsel, the FIA briefly lifted the moratorium to prepare for the preliminary injunction hearing. On April 1, 2004, the district court denied Teen Ranch's preliminary injunction motion. Upon the denial of the motion, the FIA reinstated the full moratorium. On February 17, 2005, both parties filed cross-motions for summary judgment. On September 29, 2005, the district court issued an opinion granting summary judgment in favor of the FIA. Teen Ranch timely filed the present appeal.

II.

We review *de novo* a district court's grant of summary judgment. *May v. Franklin County Comm'rs,* 437 F.3d 579, 583 (6th Cir.2006).

The district court properly considered Teen Ranch's constitutional and statutory claims, and correctly granted judgement in favor of the FIA. As a preliminary matter, the district court identified the applicable law at issue – § 220 of the Michigan State

Appropriations Bill, 2003 P.A. 172 ("Public Act")[3] – which governs contracts between the FIA and faith-based organizations and also instructs the FIA to follow the guidelines set forth in 42 U.S.C. § 604a,[4]

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[3] In full, section 220 provides:

> (1) In contracting with faith-based organizations for mentoring or supportive services, and in all contracts for services, the department shall ensure that no funds provided directly to institutions or organizations to provide services and administer programs shall be used or expended for any sectarian activity, including sectarian worship, instruction, or proselytization.
>
> (2) If an individual requests the service and has an objection to the religious character of the institution or organization from which the individual receives or would receive services or assistance, the department shall provide the individual within a reasonable time after the date of the objection with assistance or services and which are substantially the same as the service the individual would have received from the organization.
>
> (3) The department shall ensure that faith-based organizations are able to apply and compete for services, programs, or contracts that they are qualified and suitable to fulfill. The department shall not disqualify faith-based organizations solely on the basis of the religious nature of their organization or their guiding principles or statements of faith.
>
> (4) The department shall follow guidelines related to faith-based involvement established in section 104 of title I of the personal responsibility and work opportunity reconciliation act of 1996, Public Law 104-193, 42 U.S.C. § 604a.

2003 Mich. Pub. Acts 775.

[4] In pertinent part, 42 U.S.C. § 604a provides that:

(Continued on following page)

the federal statute that governs contracts between states and charitable, religious or private organizations. The district court properly recognized that this case turns on whether the FIA's funding of Teen

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(b) . . . The purpose of this section is to allow States to contract with religious organizations . . . on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program.

(c) . . . In the event a State exercises its authority . . . religious organizations are eligible, on the same basis as any other private organization . . . so long as the programs are implemented consistent with the Establishment Clause of the United States Constitution. . . .

(e) . . . (1) . . . If an individual . . . has an objection to the religious character of the organization or institution from which the individual receives, or would receive, assistance . . . the State in which the individual resides shall provide such individual (if otherwise eligible for such assistance) within a reasonable period of time after the date of such objection with assistance from an alternative provider that is accessible to the individual and the value of which is not less than the value of the assistance which the individual would have received from such organization. . . .

(i) . . . Any party which seeks to enforce its rights under this section may assert a civil action for injunctive relief exclusively in an appropriate State court against the entity or agency that allegedly commits such violation.

(j) . . . No funds provided directly to institutions or organizations to provide services and administer programs . . . shall be expended for sectarian worship, instruction, or proselytization.

Ranch is indirect, rather than direct, because the funding is "a result of the genuine and independent choices of private individuals." *Zelman v. Simmons-Harris,* 536 U.S. 639, 649, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002); *see also Mitchell v. Helms,* 530 U.S. 793, 810, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (Supreme Court stating that it has "repeatedly considered whether any governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private choices of individuals[ ]'" rather than "the unmediated will of government.") (quoting *Agostini v. Felton,* 521 U.S. 203, 226, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997)).[5] Accordingly, the district court examined "whether the ability of youth to opt out of the Teen Ranch program pursuant to § 220(2) of the Public Act based on its religious character gives the youth true private choice so as to make the funding of the religious programs at Teen Ranch indirect rather than direct." *Teen Ranch v. Udow,* 389 F.Supp.2d 827, 834-35 (W.D.Mich.2005).

After a thorough analysis, the district court concluded that the opt out provision of § 220(2) of the Public Act did not equate to a "true private choice," since "the State selects the [youth's] residential

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[5] "For if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment." *Mitchell,* 530 U.S. at 810, 120 S.Ct. 2530.

placement, . . . [and the youth's] ability to opt out of placement at a faith-based institution with religious programming is not sufficient to avoid Establishment Clause problems because State placements at Teen Ranch would advance or endorse a particular religious viewpoint." *Id.* at 836. Therefore, since the opt out provision does not give youth "true private choice," the district court held that "the State cannot fund placements at Teen Ranch [given its religious programming] without running afoul of the Public Act and the Establishment Clause." *Id.* at 837; *see also Mitchell,* 530 U.S. at 816-17, 120 S.Ct. 2530 (holding that "[a]ny money that ultimately went to religious institutions . . . as a result of the genuinely independent and private choices of individuals" is valid. (internal quotations and citation omitted)). In addition, the district court properly regarded the youth and vulnerability of the class of citizens at issue here as a relevant consideration. *See, e.g., Lee v. Weisman,* 505 U.S. 577, 592, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) ("As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.") (citing *School Dist. of Abington v. Schempp,* 374 U.S. 203, 307, 83 S.Ct. 1560, 10 L.Ed.2d 844, (1963)) (Goldberg, J., concurring); *Edwards v. Aguillard,* 482 U.S. 578, 584, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987); *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens,* 496 U.S. 226, 261-262, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (Kennedy, J., concurring).

Following the determination that § 220(2) of the Public Act did not provide a "true private choice," the district court proceeded to address Teen Ranch's five claims. Rejecting Teen Ranch's Free Exercise Clause claim, the district court distinguished *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and the line of cases following *Sherbert,* which held that the government could not deny a public benefit based on a worker's religious beliefs, and concluded that "[u]nlike unemployment benefits or the ability to hold office, a state contract for youth residential services is not a public benefit." *Teen Ranch,* 389 F.Supp.2d at 838. In addition, relying on *Locke v. Davey,* 540 U.S. 712, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004), which held that a state scholarship program that excluded students pursuing degrees in theology did not violate the Free Exercise Clause, the district court concluded that the FIA's failure to fund Teen Ranch's religious programming does not violate Teen Ranch's free exercise rights. *Id.*

Turning to Teen Ranch's free speech claim, the district court held that the FIA's decision to contract out its child services did not create a forum for private speech since "[t]he purpose of contracting for these services is to provide treatment for troubled youth in a residential setting, not to promote the private speech of the providers of that care." *Id.* at 840. As to the due process claim, the district court disagreed with Teen Ranch because the FIA instituted the moratorium according to the standards set forth in the Public Act which "guide the FIA regarding

contracts with faith-based organizations and restricts the FIA from directly funding sectarian activities." *Id.* Likewise, the district court rejected Teen Ranch's equal protection claim because there was no evidence of a similarly-situated private placement facility that "incorporate[d] religion as an integral part of its residential program." *Id.* at 841. The district court further explained that, even if Teen Ranch was similarly-situated, the FIA's "desire to avoid violating the Establishment Clause . . . is sufficient to meet the rational basis test." *Id.*

In denying Teen Ranch's fifth and final claim under 42 U.S.C. § 604a, the district court, citing § 604a(i), noted that the statute does not create any private rights enforceable in federal court. The district court also recognized that § 604a applies only to programs funded under Titles I, II, and IV-A of the Social Security Act, and the "FIA is funded for a portion of its foster care placement costs under Title IV-E . . . rather than Title IV-A." *Id.* at 841-42. Also, under its fifth claim, Teen Ranch alleged to have made a state law claim under § 220 of the Public Act. However, the district court found insufficient evidence to support this allegation, and to the extent a state claim was alleged, the district "[c]ourt decline[d] to exercise supplement[al] jurisdiction . . . because the [c]ourt had dismissed all of the federal claims over which it had original jurisdiction." *Id.* at 842.

After thoroughly reviewing the record, we believe that the district court was correct in reaching its conclusions and granting summary judgment in favor

of the FIA. For the same reasons identified by the district court, we conclude that the opt out provision of the Public Act did not provide the children placed in the care of the FIA with "true private choice." Likewise, after carefully considering the applicable law, we also reject all five of Teen Ranch's arguments for the reasons articulated by the district court. The district court's opinion was sound, as it clearly articulated and provided the reasoning for rejecting Teen Ranch's constitutional claims.

While we are satisfied with affirming on the basis of the district court's well-considered opinion, we will take this opportunity to further consider the viability of Teen Ranch's fifth claim – a § 1983 action alleging violation of rights under 42 U.S.C. § 604a, a federal statute which provides a specific remedy that requires "[a]ny party which seeks to enforce its rights . . . may assert a civil action for injunctive relief exclusively in an appropriate State court against the entity or agency that allegedly commits such violation." 42 U.S.C. § 604a(i). The district court, understandably, did not address this issue. However, we believe it warrants consideration since both Teen Ranch and the FIA dedicate considerable efforts to this claim.

It is settled that "[42 U.S.C.] § 1983 is available as a remedy for violations of federal statutes as well as for constitutional violations." *Suter v. Artist M.*, 503 U.S. 347, 355, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992) (citing *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980)). However, "§ 1983

does not provide an avenue for relief every time a state actor violates a federal law." *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 119, 125 S.Ct. 1453, 161 L.Ed.2d 316 (2005). For example, "§ 1983 is not available to enforce a violation of a federal statute 'where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983.'" *Suter,* 503 U.S. at 355-56, 112 S.Ct. 1360 (quoting *Wright v. Roanoke Redev. & Hous. Auth.,* 479 U.S. 418, 423, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987)).

"Accordingly, to sustain a § 1983 action, the plaintiff must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs." *Abrams,* 544 U.S. at 120, 125 S.Ct. 1453. "Even after this showing, . . . [t]he defendant may defeat this presumption by demonstrating that Congress did not intend that remedy for a newly created right." *Id.* "[C]ongressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a 'comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'" *Id.* (quoting *Blessing v. Freestone,* 520 U.S. 329, 341, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997)). Moreover, "[t]he provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983." *Id.* at 121, 125 S.Ct. 1453. However, "[t]he ordinary inference that the

remedy provided in the statute is exclusive can surely be overcome by textual indication, express or implicit, that the remedy is to complement, rather than supplant, § 1983." *Id.* at 122, 125 S.Ct. 1453. The party seeking to enforce the federal statutory right bears the burden of demonstrating that Congress intended to create the private federal remedy sought. *Suter,* 503 U.S. at 363-64, 112 S.Ct. 1360.

In the instant matter, 42 U.S.C. § 604a(i) expressly provides that a plaintiff's remedy under § 604a resides exclusively in state court. As such, we must conclude that "Congress did not intend to leave open a more expansive remedy under § 1983." *Abrams,* 544 U.S. at 121, 125 S.Ct. 1453. As noted in *Abrams,* "'the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Id.* (quoting *Alexander v. Sandoval,* 532 U.S. 275, 290, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001)). Likewise, 42 U.S.C. § 604a does not provide a textual indication, express or implicit, that the remedy provided for in state court is complementary to the remedies available under § 1983. Teen Ranch has failed to provide, as it must, any evidence indicating that § 604a(i) was not intended to foreclose or supplant the available remedies under § 1983. Accordingly, Teen Ranch's rights under 42 U.S.C. § 604a may be enforced only in state court; thus, a cause of action under this federal statute is not cognizable in federal court.

III.

Accordingly, for the reasons stated in the district court's well-considered opinion and the additional reasons provided herein, we **AFFIRM** the district court's grant of summary judgment in favor of the FIA.

389 F.Supp.2d 827

United States District Court, W.D. Michigan, Southern Division.

TEEN RANCH, et al., Plaintiffs,

v.

Marianne UDOW, et al., Defendants.

No. 5:04-CV-32.

Sept. 29, 2005.

Gary S. McCaleb, Alliance Defense Fund, Scottsdale, AZ, Joel L. Oster, Alliance Defense Fund, Midwest Regional Service Ctr., Olathe, KS, Robert G. Fleming, E Lansing, MI, for Plaintiffs.

Erica Weiss Marsden, Joel D. McGormley, MI Dept Attorney General (Education/Social Services), Education & Social Services Division, Lansing, MI, for Defendants.

OPINION

BELL, Chief Judge.

This action, which involves the provision of youth residential services by a faith-based organization under contract with the State, is before the Court on the parties' cross-motions for summary judgment. For the reasons that follow judgment will be entered in favor of the State Defendants.

I.

Plaintiffs in this action are Teen Ranch, Matthew J. Koch, its Chief Executive Officer, and Mitchell E. Koster, its Chief Operating Officer (collectively referred to as "Teen Ranch"). Teen Ranch is a non-denominational Christian faith-based organization that has provided residential care for delinquent, neglected, abused, and emotionally troubled youth between the ages of 11 and 17 since 1966.

Defendants are Marianne Udow, Director of the Michigan Family Independence Agency ("FIA"), Musette A. Michael, Interim Director of the FIA, and Debora Buchanan, Manager of the Purchased Care Division of the FIA (collectively referred to as the "FIA" or the "State Defendants"). The FIA is a department of Michigan state government that is responsible for administering Michigan's public assistance, child and family welfare programs. M.C.L. § 400.1. The FIA is responsible for providing care and supervision to abused, neglected and delinquent children who have been committed to or placed in the care of the FIA through the state courts. M.C.L. §§ 400.114-400.115e. The FIA is authorized to place these children in out-of-home care and may contract with private organizations to provide these services. M.C.L. § 400.115(a); M.C.L. § 400.115a(1)(f).

Each year the FIA takes in approximately 3000 children for residential care. (Buchanan Dep. at 9). The FIA contracts with 96 private child care agencies to provide residential services to the youth for stays

averaging four to twelve months. At least 35 of the providers are faith-based organizations. (Buchanan Aff. ¶ 6). According to Buchanan, Teen Ranch is the only provider that incorporates its religious beliefs and teaching into the services funded under its contract with the FIA. (Buchanan Aff. ¶ 6).

When a child is made a state ward and placed with the FIA for care and supervision, the FIA does not offer the child a list of placement choices. Instead, the FIA places the child in one of its residential programs according to what the FIA believes is in the best interests of the child. The placement is determined by a computerized grid. The FIA obtains information about the child's history and treatment needs, inputs that information into the computer system, and the computer system finds the best matches between the youth's needs and the services provided by the various programs. Generally, the FIA places the child at the agency that has the best treatment match. If two facilities are equal, then the FIA will place the child at the agency that has waited the longest for a placement. (Slottke Dep. at pp. 5-35). Juvenile wards of the state receive assistance from a caseworker, a lawyer/guardian ad litem and parents or a guardian. (Buchanan Dep. at 112-119; Udow Dep. at 25-26).

The FIA's last contract extension with Teen Ranch expired on October 1, 2003. In November 2003, after an investigation of the Teen Ranch program, the FIA issued a moratorium against further placements at Teen Ranch. The FIA had a number of initial

concerns, but the incorporation of religious practices into the programming at Teen Ranch emerged as the FIA's primary concern.

In December 2003, Teen Ranch addressed FIA's concerns regarding its religious practices as follows:

> The mission statement of Teen Ranch states, "*providing hope to young people and families through life changing relationships and experiences from a Christian perspective.*" This mission, and our interpretation of this mission, will not change, be sacrificed, nor will it be compromised.
>
> Teen Ranch, as policy, does not "force" youth to attend religious services, although it is encouraged and we believe to be part of an effective treatment program. Alternatives are provided for the children who wish not to attend religious services, such as a personal academic study time (if desired), letter writing home, recreational time in the gymnasium, or watch television until the other youth return home.
>
> However, incorporating religious teachings into on-going daily activities of youth and their treatment plans touches at the core of why we were founded, why we are here today, and why we will continue to include such programming for children in our care.

(Amendment of Corrective Action Plan, Def. Ex. EE at 8) (emphasis in original).

Although there are many disputed facts concerning the specific manner in which religion is incorporated into the Teen Ranch program, Teen Ranch acknowledges that it is overtly and unapologetically a Christian facility with a Christian worldview that hopes to touch and improve the lives of the youth it serves by encouraging their conversion to faith in Christ, or assisting them in deepening their pre-existing Christian faith. (Policy Directive at 6, Def. Ex. DD). Teen Ranch expresses its religious beliefs through voluntary prayer, devotions, church attendance and faith discussions. (Pl. Statement of Undisputed Facts ¶ 5).

By letter dated January 9, 2004, the FIA informed Teen Ranch that while it was supportive of faith-based organizations, "[t]he incorporation of faith specific tenets into treatment is not permitted by state and federal law," and that "if Teen Ranch is unwilling to modify its current practices regarding the imposition of its religious beliefs into the daily treatment and service plan activities, FIA is unable to approve the corrective action plan and rescind the moratorium." (Def.Ex. B).

Teen Ranch independently adopted a procedure that required wards to be informed of the religious nature of Teen Ranch prior to being placed there, and giving the ward an opportunity to object to a Teen Ranch placement both before and after the actual placement. Although the FIA did place a few youth at Teen Ranch after it announced the moratorium in December 2003, the FIA reinstated the full moratorium

against placements at Teen Ranch after this Court denied Teen Ranch's motion for preliminary injunction.

Because most of Teen Ranch's residents were state placements, the moratorium has had a profound financial effect on Teen Ranch. Since the moratorium was entered Teen Ranch has had to close several of its programs and to sell half of its residential facilities. (Pl. Br. in Supp. of S.J. at 1).

Teen Ranch filed this action asserting four constitutional claims – violation of free exercise, free speech, due process, and equal protection, and one statutory claim – violation of the right to free exercise under 42 U.S.C. § 604a. This Court previously denied Teen Ranch's motion for a preliminary injunction. This matter is currently before the Court on the parties' cross-motions for summary judgment.

II.

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In evaluating a motion for summary judgment the Court must look beyond the pleadings and assess the proof to determine whether there is a genuine need for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). If the moving party carries its burden of showing there is an absence of evidence to support a

claim then the non-moving party must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue of material fact for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient to create a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The proper inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52, 106 S.Ct. 2505.

III.

Although a variety of legal theories and factual issues have been raised in the course of this litigation, this case is, at its heart, about the tension between the Free Exercise Clause and the Establishment Clause of the First Amendment.[1] These two clauses are frequently in tension. *See Locke v. Davey,* 540 U.S. 712, 718-19, 124 S.Ct. 1307, 158 L.Ed.2d 1

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[1] The First Amendment provides in part that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const. Amend. 1. The Establishment and Free Exercise Clauses have been made applicable to the States by incorporation into the Fourteenth Amendment. *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

(2004). Teen Ranch wants to be free to exercise its religious faith without interference from the State, and the FIA wants to avoid violating the Establishment Clause by subsidizing a particular religious viewpoint.

The Supreme Court articulated a test for determining when state funding violates the Establishment Clause in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), and refined the test in *Agostini v. Felton,* 521 U.S. 203, 221-23, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). Under the resulting *Lemon/Agostini* test, the Court must consider whether the funding has "the purpose of advancing or inhibiting religion" and whether the funding has "the effect of advancing or inhibiting religion." *DeStefano v. Emergency Housing Group, Inc.,* 247 F.3d 397, 406 (2nd Cir.2001) (quoting *Mitchell v. Helms,* 530 U.S. 793, 120 S.Ct. 2530, 2559, 147 L.Ed.2d 660 (2000) (O'Connor, J., concurring in the judgment)). To answer the second question of effect, the court must consider whether the funding results in "governmental indoctrination," whether it defines its participants by reference to religion, and whether it creates excessive government entanglement with religion. *Id. See also Freedom from Religion Foundation, Inc. v. McCallum,* 179 F.Supp.2d 950, 966 (W.D.Wis.2002), *on reconsideration in part,* 214 F.Supp.2d 905 (W.D.Wis.2002), *aff'd,* 324 F.3d 880 (7th Cir.2003). "These same factors can in most situations be evaluated to answer what is often thought to be a separate question, whether a

practice amounts to an unconstitutional government 'endorsement' of religion." *DeStefano,* 247 F.3d at 406.

The tension in this case between the Establishment Clause and the Free Exercise Clause is focused by § 220 of the State appropriations bill, 2004 P.A. 344 (the "Public Act"), that governs the FIA's contracts with faith-based organizations.[2] Section 220 has been a part of every FIA appropriations bill since 2001. *See, e.g.,* 2003 P.A. 172 § 220. Section 220 provides that "the department shall ensure that **no funds provided directly** to institutions or organizations to provide services and administer programs **shall be used or expended for any sectarian activity**, including sectarian worship, instruction, or proselytization." 2004 P.A. 344, § 220(1) (emphasis added). If an individual who receives services from the FIA objects to the religious character of the organization providing services, the FIA will provide services from an alternative provider. *Id.* at § 220(2). "The department **shall not disqualify** faith-based organizations **solely on the basis of the religious nature of their organization or their guiding principles or statements of faith.**" *Id.* at § 220(3) (emphasis added). Finally, the FIA is required to

[2] Defendants' contention that Plaintiffs did not allege a violation of § 220 of the Public Act is addressed in the discussion of Count V in Section VIII of this Opinion. The Court analyzes § 220 of the Public Act here, not as a separate claim for relief, but as the factual and legal background that forms the foundation for the parties' constitutional claims.

follow the guidelines related to faith-based involvement found in 42 U.S.C. § 604a.[3]

The federal statute referenced in § 220(4) is the charitable choice section of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996

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[3] The full text of § 220 reads as follows:

(1) In contracting with faith-based organizations for mentoring or supportive services, and in all contracts for services, the department shall ensure that no funds provided directly to institutions or organizations to provide services and administer programs shall be used or expended for any sectarian activity, including sectarian worship, instruction, or proselytization.

(2) If an individual requests the service and has an objection to the religious character of the institution or organization from which the individual receives or would receive services or assistance, the department shall provide the individual within a reasonable time after the date of the objection with assistance or services and which are substantially the same as the service the individual would have received from the organization.

(3) The department shall ensure that faith-based organizations are able to apply and compete for services, programs, or contracts that they are qualified and suitable to fulfill. The department shall not disqualify faith-based organizations solely on the basis of the religious nature of their organization or their guiding principles or statements of faith.

(4) The department shall follow guidelines related to faith-based involvement established in section 104 of title I of the personal responsibility and work opportunity reconciliation act of 1996, 42 USC § 604a.

Public Act 334 (2004).

("PRWORA"), 42 U.S.C. § 604a. The guidelines in § 604a are very similar to the provisions of § 220. The federal law expressly prohibits direct funding of sectarian worship, instruction, or proselytization;[4] requires the state to provide alternative services if the recipient objects to the religious character of the organization;[5] prohibits the state from discriminating against a religious organization on the basis of its religious character so long as the programs are implemented consistent with the Establishment

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[4] Section 604a(j) provides:

> No funds provided directly to institutions or organizations to provide services and administer programs under subsection (a)(1)(A) of this section shall be expended for sectarian worship, instruction, or proselytization.

42 U.S.C. § 604a(j).

[5] Section 604a(e)(1) provides:

> If an individual described in paragraph (2) has an objection to the religious character of the organization or institution from which the individual receives, or would receive, assistance funded under any program described in subsection (a)(2) of this section, the State in which the individual resides shall provide such individual (if otherwise eligible for such assistance) within a reasonable period of time after the date of such objection with assistance from an alternative provider that is accessible to the individual and the value of which is not less than the value of the assistance which the individual would have received from such organization.

42 U.S.C. § 604a(e)(1).

Clause;[6] and enables the organization to retain its religious character.[7]

The Public Act, together with 42 U.S.C. § 604a, have changed some of the rules regarding public funding of religious organizations:

> Although religious organizations have been eligible to receive government aid under certain government programs for many years,

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[6] 42 U.S.C. § 604a(c) provides:

> In the event a State exercises its authority under subsection (a) of this section, religious organizations are eligible, on the same basis as any other private organization, as contractors to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, under any program described in subsection (a)(2) of this section so long as the programs are implemented consistent with the Establishment Clause of the United States Constitution. Except as provided in subsection (k) of this section, neither the Federal Government nor a State receiving funds under such programs shall discriminate against an organization which is or applies to be a contractor to provide assistance, or which accepts certificates, vouchers, or other forms of disbursement, on the basis that the organization has a religious character.

[7] 42 U.S.C. § 604a(d)(1) provides:

> A religious organization with a contract described in subsection (a)(1)(A) of this section, or which accepts certificates, vouchers, or other forms of disbursement under subsection (a)(1)(B) of this section, shall retain its independence from Federal, State, and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs.

> charitable choice is unique in that it does not require participating faith-based organizations to "secularize" themselves as a condition to receiving public funds. To the contrary, the charitable choice statute allows publicly funded religious organizations to retain their religious character and to employ their religious faith in carrying out secular social service programs, as long as the programs are administered in conformance with the establishment clause of the First Amendment.

McCallum, 179 F.Supp.2d at 982.

Both § 220 of the Public Act and 42 U.S.C. § 604a make important distinctions based upon whether funds are provided "directly" to the faith-based organization. Counsel for Teen Ranch candidly acknowledged to this Court during oral argument that if its program is directly funded by the State, then the State could not fund its program without violating the Establishment Clause and the Public Act. If, however, the funding is "indirect," then the State is not permitted under the Public Act to condition funding on the elimination of Teen Ranch's religious practices.

The State contends that its funding of Teen Ranch is direct because it contracts with and pays the funds directly to Teen Ranch. (Def. Br in Reply at 4-5). Contrary to the State Defendants' assertions, it appears that most courts would agree that funding is not "direct" simply because it is paid directly from the State to the faith-based organization rather than by

the individual through a voucher, coupon or certificate. The plurality of the Supreme Court noted in *Mitchell v. Helms,* 530 U.S. 793, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000), that although previous cases had emphasized the distinction between direct and indirect aid, more recent cases have addressed the purpose of preventing subsidization of religion by focusing on the principle of "private choice." *Id.* at 815-16, 120 S.Ct. 2530 (Thomas, J., plurality). "Although the presence of private choice is easier to see when the aid literally passes though the hands of individuals . . . there is no reason why the Establishment Clause requires such form." *Id.* at 816, 120 S.Ct. 2530. *See also McCallum,* 324 F.3d at 882 ("so far as the policy of the establishment clause is concerned, there is no difference between giving the voucher recipient a piece of paper that directs the public agency to pay the service provider and the agency's asking the recipient to indicate his preference and paying the provider whose service he prefers."); *McCallum,* 179 F.Supp.2d at 970 ("A plurality of the Supreme Court has held that as long as the individual selects the publicly funded program freely, thus making the funding truly indirect, it is irrelevant whether the funding passes through the hands of the individual first or goes directly to the selected program.").

The Supreme Court has repeatedly upheld programs against Establishment Clause challenges where the state funding of the programs arose out of "true private choice" or the "genuine and independent

choices of private individuals." *Zelman v. Simmons-Harris,* 536 U.S. 639, 649, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002) (citing *Mueller v. Allen,* 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983); *Witters v. Washington Dept. of Servs. for Blind,* 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986); *Zobrest v. Catalina Foothills Sch. Dist.,* 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993)). "Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients." *Locke,* 540 U.S. at 719, 124 S.Ct. 1307. "[W]hen public funding flows to faith-based organizations solely as a result of the 'genuinely independent and private choices of individuals,' the funding is considered indirect." *McCallum,* 179 F.Supp.2d at 970 (citing *Agostini v. Felton,* 521 U.S. 203, 226, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997)). "When a program receives indirect funding, it is the individual participant, and not the state, who chooses to support the religious organization, reducing the likelihood that the public funding has the primary effect of advancing religion in violation of the establishment clause." *Id.*

It is evident from these cases that the critical feature distinguishing direct funding from indirect funding is whether the individual has selected the program through true private choice. The Establishment Clause is not violated if the state money goes to a religious organization only as a result of the genuinely independent and private choices of an individual. In other words, private choice transforms constitutionally

troublesome "direct" funding into constitutionally unobjectionable "indirect" funding.

Although many issues have been raised by the parties, they all boil down to the single issue of whether the ability of youth to opt out of the Teen Ranch program pursuant to § 220(2) of the Public Act based on its religious character gives the youth true private choice so as to make the funding of the religious programs at Teen Ranch indirect rather than direct.[8]

The FIA points out that the ward does not get to choose where he is placed. Both the initial and the ultimate placement decision lies with the state. The FIA also contends that state wards are too young, vulnerable, and traumatized to be able to make the ability to opt out of a religious placement an exercise of true private choice.

Teen Ranch contends that the wards have the private choice on whether to attend Teen Ranch, a choice that is protected by state and federal statutes. Teen Ranch also rejects the State's assertion that the wards are too vulnerable to make a choice because

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[8] After the initiation of the moratorium, Teen Ranch adopted a procedure that required wards to be informed of the religious nature of Teen Ranch prior to being placed at Teen Ranch, and provided the ward an opportunity to refuse placement at Teen Ranch. Although Teen Ranch's proposed procedure is laudable, this Court will focus on the requirements of the Public Act, rather than assuming that the State must or will follow the procedures outlined by Teen Ranch.

there is no evidence that wards are particularly shy, retiring, or too fearful to reject placement at Teen Ranch or to demand relocation if they form an objection to the religious programming there, and because each ward has a caseworker, a lawyer/guardian ad litem, and a parent or guardian to assist them in voicing and protecting their interests.

Regardless of whether state wards are particularly vulnerable, they are children. The Court believes that this fact cannot be ignored as the Court considers whether an opt-out provision is sufficient to make the ward's choice "a true private choice."

All of the cases where the issue of private choice has been held sufficient to avoid Establishment Clause concerns have involved a variety of options. For example, in *McCallum* criminal parolees were offered enrollment in one of several private halfway houses under contract with the state as an alternative to being sent back to prison. The plaintiffs challenged the state's funding of Faith Works, Milwaukee, Inc., a faith-based, long-term alcohol and other drug addiction treatment program, that incorporated Christianity into its treatment program. The district court found that "offenders participate in Faith Works as a result of genuinely independent, private choice and that this choice makes the Department of Corrections contract with Faith Works an indirect program that does not convey a message of endorsement." *McCallum,* 214 F.Supp.2d at 905. The district court accordingly concluded that funding of Faith Works by the Department of Corrections did not violate the

Establishment Clause. *Id.* at 907-08. Even though *McCallum* dealt with adult offenders who had a clear choice between a religious program and a variety of secular programs, the district court still found that it was a close question. 214 F.Supp.2d at 907. In affirming, the Seventh Circuit noted that the state was eager to have Faith Works on its "menu of halfway-house choices." *McCallum,* 324 F.3d at 883. The court observed that most private schools in this country are parochial schools, and that accordingly, the fact that "most of the halfway houses with which the state has contracts are secular makes this an easier case than the school voucher case." *Id.*

The issue of true private choice was discussed most recently in *American Jewish Congress v. Corporation for National and Community Service,* 399 F.3d 351 (D.C.Cir.2005). In that case the court held that providing education awards to AmeriCorps participants who taught in religious schools did not violate the Establishment Clause. In arriving at this determination the court noted that there were "numerous" teaching positions in public and private secular schools and that no participant who wanted to teach in a secular school was impermissibly channeled to a religious school. *Id.* at 358. "When enough non-religious options exist, those participants who choose to teach in religious schools do so only as a result of their own genuine and private choice." *Id.*

In this case the wards of the State are not presented with any alternatives. They are presented with one placement by the State and they have the

ability to opt out of that placement if they object to the religious nature of the program. In that event the State will place the child in an alternative program. Although the children have the ability to opt out of a religious program, they do not have the ability to choose or reject a religious program from a menu of secular and religious programs.

The Court is aware of no case that has examined the issue of whether an opt-out provision is sufficient to constitute "true private choice." There are no cases regarding the sufficiency of an adult's ability to opt out, much less a case about children. The Court is mindful that more care must be taken when it is dealing with children. In finding private, independent choice and a lack of state endorsement of religion in *McCallum,* the district court distinguished the adult offenders who chose to participate in the Faith Works program from children who might be more impressionable or susceptible to indoctrination. 214 F.Supp.2d at 915-16, 919 (citing *School Dist. of Abington Twp. v. Schempp,* 374 U.S. 203, 307, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963)) (Goldberg, J., concurring).

Although the Court is hesitant to suggest whether an opt-out program will ever satisfy the true choice required to avoid Establishment Clause problems, the Court is satisfied that where, as here, the State selects the juvenile state ward's residential placement, the ward's ability to opt out of placement at a faith-based institution with religious programming is not sufficient to avoid Establishment Clause problems because State placements at Teen Ranch

would advance or endorse a particular religious viewpoint.

Up to this point the Court has been focusing on the choice to opt out of the Teen Ranch program. In the early stages of this case there was significant discussion as to whether participation in religious activities at Teen Ranch was voluntary. The State contended that Teen Ranch coerced wards to participate in religious activities. Teen Ranch denied the accusation and asserted that all participation in religious activities was voluntary because residents had the option of not participating in prayer, devotions, and church, and no negative consequences attached to their non-participation in these religious activities.

It appears that voluntary participation in the day-to-day religious activities at Teen Ranch is no longer the focus of the parties' dispute. Nevertheless, because Teen Ranch continues to emphasize that the youth in its program have the option of not participating in prayers before meals, devotions during the week, church attendance, or discussions concerning Christian faith, the Court feels constrained to consider whether the ability to opt out of participation in religious activities is sufficient to save the Teen Ranch program from Establishment Clause concerns. The Court concludes that it is not.

As the Supreme Court has repeatedly held in connection with the school prayer cases, the ability to

withdraw from religious activities does not make a program non-religious:

> Just as in *Engel v. Vitale,* 370 U.S., at 430, 82 S.Ct., at 1266, and *School Dist. of Abington v. Schempp,* 374 U.S., at 224-225, 83 S.Ct., at 1572-1573, where we found that provisions within the challenged legislation permitting a student to be voluntarily excused from attendance or participation in the daily prayers did not shield those practices from invalidation, the fact that attendance at the graduation ceremonies is voluntary in a legal sense does not save the religious exercise.

Lee v. Weisman, 505 U.S. 577, 596, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992). As noted in *Lee v. Weisman,* "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Id.* at 592, 112 S.Ct. 2649.

> We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.

Id. at 593, 112 S.Ct. 2649. *See also Santa Fe Independent Sch. Dist. v. Doe,* 530 U.S. 290, 301, 120 S.Ct.

2266, 147 L.Ed.2d 295 (2000) (holding that school district's policy of permitting student-led, student-initiated prayer at football games violates the Establishment Clause).

In light of the Supreme Court's determination that a student's choice to stand quietly or to remove himself from prayers during graduation or football games will not withstand constitutional scrutiny in the public school setting, it is clear that the ability to choose not to participate in religious activities at Teen Ranch cannot pass constitutional scrutiny. The pressures that the Supreme Court recognized in the public school setting would inevitably be far greater in a long term residential program where the youth are separated from their parents, deprived of many personal freedoms, and under the daily supervision and influence of those who are leading the religious activities.

Nothing in this discussion should be construed as a challenge to the sincerity or the efficacy of Teen Ranch's faith-based program. The only issue is whether an opt-out provision for juvenile state wards assigned to Teen Ranch is true private choice. The Court holds that it is not. Because there is no "true private choice," the State cannot fund placements at Teen Ranch without running afoul of the Public Act and the Establishment Clause.

With this threshold determination that funding is not appropriate under § 220 of the Public Act or the

Establishment Clause, the Court will address the five claims alleged in Plaintiffs' complaint.

IV.

Plaintiffs' first claim alleges a violation of the right to free exercise of religion under the First Amendment of the United States Constitution. Teen Ranch contends that the maintenance of the moratorium violates the Free Exercise Clause[9] because it conditions the receipt of a governmental benefit on Teen Ranch's surrender of its religious beliefs and practices and burdens the free exercise of Plaintiff's religious beliefs without satisfying the strict scrutiny standard.

"The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Div., Dept. of Human Resources of Oregon v. Smith,* 494 U.S. 872, 876-77, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). It also prohibits the government from imposing "special disabilities on the basis of religious views or religious status." *Id.* at 877, 110 S.Ct. 1595. Thus, the Supreme Court held that conditioning the award of unemployment compensation benefits on the abandonment of conduct required by an individual's religion violates the Free Exercise Clause of the First Amendment. *Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480

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[9] *See* footnote 1, above.

U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). *See also McDaniel v. Paty*, 435 U.S. 618, 626, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978) (holding that a state constitutional provision barring ministers from holding legislative office violated the Free Exercise Clause).

The *Sherbert v. Verner* line of cases all held that the government could not deny a public benefit based on the workers' religious beliefs. Unlike unemployment benefits or the ability to hold office, a state contract for youth residential services is not a public benefit. The *Sherbert v. Verner* line of cases does not stand for the proposition that the State can be required under the Free Exercise Clause to contract with a religious organization.

More on point is the Supreme Court's decision in *Locke v. Davey*, 540 U.S. 712, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004), where the Court reviewed a state scholarship program that excluded any student who was pursuing a degree in devotional theology. *Id.* at 715, 124 S.Ct. 1307. Although the law was not facially neutral with respect to religion, the Court held that it did not violate the Free Exercise Clause:

> It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. And it does not require students to

> choose between their religious beliefs and receiving a government benefit. The State has merely chosen not to fund a distinct category of instruction.

Id. at 720-21, 124 S.Ct. 1307 (citations omitted).

In *Gary S. v. Manchester School Dist.*, 374 F.3d 15 (1st Cir.2004), the First Circuit held that the failure to provide federal and state funding for certain special education services provided by private religious schools even though the same services were funded when provided by public schools, did not violate the Free Exercise rights of a disabled child or his parents. "[I]t is clear there is no federal constitutional requirement that private schools be permitted to share with public schools in state largesse on an equal basis." *Gary S. v. Manchester School Dist.* 374 F.3d 15, 21 (1st Cir.2004). "[T]he mere non-funding of private secular and religious school programs does not 'burden' a person's religion or the free exercise thereof." *Id.* at 21-22.

Subsequently, the First Circuit addressed the issue of whether a Maine statute providing that only nonsectarian schools were eligible to receive public funds for tuition violated the Free Exercise Clause or Equal Protection. The court held that it did not: "*Davey* confirms that the Free Exercise Clause's protection of religious beliefs and practices from direct government encroachment does not translate into an affirmative requirement that public entities fund religious activity simply because they choose to

fund the secular equivalents of such activity." *Eulitt v. Maine, Dept. of Educ.*, 386 F.3d 344, 354 (1st Cir.2004).

There is no question that in the absence of the non-discrimination provisions of the Public Act the State's failure to contract with a particular faith-based organization would not violate the organization's Free Exercise rights. Teen Ranch's Free Exercise claim accordingly depends on the State's violation of the Public Act. This Court has determined above that the FIA did not violate the Public Act. In light of this determination, the State Defendants are entitled to judgment on Plaintiffs' Free Exercise claim.

V.

Plaintiffs' second claim alleges a violation of the Free Speech Clause of the First Amendment. Plaintiffs contend that FIA's assertion that it will not rescind the moratorium unless Teen Ranch modifies its current practices of imposing its religious beliefs into its treatment and service plan activities is blatant viewpoint discrimination. Plaintiffs cite *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), in support of its contention that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* at 829, 115 S.Ct. 2510.

In *Rosenberger* the Supreme Court held that a university's denial of funds to an organization that published a newspaper with a Christian editorial viewpoint amounted to viewpoint discrimination in violation of the First Amendment. *Id.* at 832, 115 S.Ct. 2510. As noted in *Locke,* the unconstitutional viewpoint restriction discussed in *Rosenberger* is limited to cases involving speech in a public forum. *Locke,* 540 U.S. at 720 n. 3, 124 S.Ct. 1307. The *Locke* Court distinguished *Rosenberger* on the basis that the state scholarship program was not a forum for speech. The purpose of the program was to assist students with the cost of college education not to "encourage a diversity of views from private speakers." *Locke,* 124 S.Ct. at 1312 n. 3, 124 S.Ct. 1307 (quoting *United States v. Am. Library Ass'n,* 539 U.S. 194, 206, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003)). "[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust v. Sullivan,* 500 U.S. 173, 194, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (holding that Free Speech Clause was not violated by federal regulations prohibiting recipients of federal funding for family-planning services from engaging in abortion counseling or referral).

A free speech argument was similarly rejected in *McCallum* on the grounds that the government had not created a forum for speech. The district court held that Wisconsin's decision to contract with private entities to deliver drug and alcohol services did not create, encourage or otherwise facilitate private

expression, and accordingly the state could make a content-based selection of private sector providers without violating the First Amendment. 179 F.Supp.2d at 979-81.

Plaintiffs attempt to distinguish *Locke* and *McCallum* on the basis that 42 U.S.C. § 604a and the State Public Act explicitly give faith-based organizations such as Teen Ranch the right to express their religious beliefs, thus creating a forum for free speech. Plaintiffs suggest that in light of these statutes, this case is governed by *Legal Services Corp. v. Velazquez,* 531 U.S. 533, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001).

In *Velazquez* the Supreme Court held that an act prohibiting the use of funding from the Legal Services Corporation ("LSC") for legal challenges to existing welfare law violated the First Amendment. *Id.* at 536-37, 121 S.Ct. 1043. The Court noted that although the purpose of the LSC program was "not to 'encourage a diversity of views,' the salient point is that, like the program in *Rosenberger,* the LSC program was designed to facilitate private speech, not to promote a governmental message." *Id.* at 542, 121 S.Ct. 1043. By restricting the legal arguments that could be made, the Act unconstitutionally infringed on the private speech of indigent litigants and their attorneys. *Id.* at 546-49, 121 S.Ct. 1043. Even in *Velazquez*, however, the Court reiterated that "viewpoint based funding decisions can be sustained in instances in which the government itself is the speaker, or in instances . . . in which the government

use[s] private speakers to transmit information pertaining to its own program." 531 U.S. at 541, 121 S.Ct. 1043.

The fact that FIA has decided to contract out some of its children's services responsibilities to private providers does not create a forum for private speech. The purpose of contracting for these services is to provide treatment for troubled youth in a residential setting, not to promote the private speech of the providers of that care. Unlike the LSC program discussed in *Velazquez*, the State Public Act is one of those instances in which the government uses private speakers to transmit information concerning the government's own program.

Moreover, even if the Court were to find that the Public Act created a limited forum for speech, that forum is limited to sectarian programs that are not directly funded, i.e., that are chosen by individuals as a matter of "true private choice." Because the Public Act specifically prohibits direct funding of any sectarian activity, it does not create a forum for speech when the participants do not have a true private choice on whether or not to participate in the program.

For all these reasons, the State Defendants are entitled to judgment on Plaintiffs' Free Speech claim.

VI.

Plaintiffs' third claim alleges a violation of the Due Process Clause of the Fourteenth Amendment. Plaintiffs contend that the moratorium violates their due process rights because it is vague and fails to provide explicit standards. Plaintiffs contend there are no standards to guide the FIA in imposing a moratorium, and thus the Defendants' actions are unconstitutionally vague. *See Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."); *United Food & Comm'l Workers Union, Local 1099 v. Southwest Ohio Regional Transit Auth.,* 163 F.3d 341, 358-59 (6th Cir.1998) ("Due process requires that we hold a state enactment void for vagueness if its prohibitive terms are not clearly defined such that a person of ordinary intelligence can readily identify the applicable standard for inclusion and exclusion.").

Contrary to Plaintiffs' assertions, the FIA's determination to enter into a moratorium on further placements at Teen Ranch was not a matter of unbridled discretion. The Public Act contains standards that guide the FIA regarding contracts with faith-based organizations and restricts the FIA from directly funding sectarian activities. Those standards are not unconstitutionally vague. Accordingly, the State Defendants are entitled to judgment on Plaintiffs' due process claim.

VII.

Plaintiffs' fourth claim alleges a violation of the Equal Protection Clause[10] of the Fourteenth Amendment. The Equal Protection Clause directs that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

Teen Ranch contends that it is similarly situated to the other private placement facilities that contract with the State and offer similar services, some of which are secular and others which are faith-based.

The FIA has presented unrebutted evidence that it is aware of no other placement facility that incorporates its religious beliefs and teachings into the services funded under its contract with FIA, (Buchanan Dep. at ¶ 6), or that incorporates religion as an integral part of its residential program. Accordingly, it is not similarly situated to the other private placement facilities that contract with the state.

Even if it were similarly situated, under equal protection analysis strict scrutiny is only applied if there is an infringement of a fundamental right or discrimination against a suspect class. Under equal protection analysis, "[i]f a protected class or fundamental right is involved, this Court must apply strict

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[10] The Equal Protection Clause guarantees that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV § 1.

scrutiny, but where no suspect class or fundamental right is implicated, this Court must apply rational basis review." *Midkiff v. Adams County Regional Water District,* 409 F.3d 758, 770 (6th Cir.2005) (citing *Hadix v. Johnson,* 230 F.3d 840, 843 (6th Cir.2000)).

Plaintiffs contend that the Defendants' discriminatory treatment is subject to strict scrutiny because the discriminatory policy infringes First Amendment rights. Because this Court has already determined that Plaintiffs do not have a meritorious Free Speech or Free Exercise claim, their Equal Protection claim is subject to rational basis scrutiny.

In *Eulitt* the First Circuit found that Maine's reasons for excluding religious schools from education plans that extend public funding to private schools for the provision of secular education to Maine students met the rational basis test. Those reasons included:

> concentrating limited state funds on its goal of providing secular education, avoiding entanglement, and allaying concerns about accountability that undoubtedly would accompany state oversight of parochial schools' curricula and policies (especially those pertaining to admission, religious tolerance, and participation in religious activities).

Eulitt, 386 F.3d at 356.

In this case the State Defendants' desire to avoid violating the Establishment Clause through direct funding of a program that incorporates specific religious teaching, worship, or proselytization, is sufficient to

meet the rational basis test. Accordingly, the State Defendants are entitled to judgment on Teen Ranch's Equal Protection claim.

VIII.

Plaintiffs' fifth claim alleges a violation of Teen Ranch's statutory right to free exercise of religion. Teen Ranch alleges that the FIA's moratorium on placements at Teen Ranch violates their rights under 42 U.S.C. § 604a.

Defendants contend this Court lacks jurisdiction over any claim based on 42 U.S.C. § 604a because this statute does not create any private rights enforceable in federal court. The statute provides:

> Any party which seeks to enforce its rights under this section may assert a civil action for injunctive relief exclusively in an appropriate State court against the entity or agency that allegedly commits such violation.

42 U.S.C. § 604a(i).

Moreover, by its terms, § 604a applies only to programs that are funded under Title IV-A of the Social Security Act and any other program established or modified under Title I or II of the Social Security Act. 42 U.S.C. § 604a(a)(1). FIA is funded for a portion of its foster care placement costs under Title IV-E of the Social Security Act, rather than Title IV-A.

Plaintiffs have not rebutted Defendants' argument that § 604a does not apply to its residential placement programs. Instead, they now claim that they have a cause of action under § 220 of the Public Act.

Plaintiffs did not clearly allege a violation of state law as a basis for relief in their complaint. In Count V Plaintiffs alleged that "42 U.S.C. § 604(a) (and state law applying § 604(a)) prohibit government entities from requiring faith-based providers to alter their religious practices or nature as a condition of receiving youth placed by FIA." (Compl. at 24, ¶ 1). "Therefore FIA's refusal to lift its unlawful moratorium on new placements at Teen Ranch violates the statutory right to its religious nature and practices protected by 42 U.S.C. § 604(a)." (Compl. at 24, ¶ 5).

The only reference to the state law is found in the parenthetical in paragraph 1 of Count V. This parenthetical reference is not sufficient to place the State on notice that it is being sued for a violation of State law. Moreover, to the extent Plaintiffs are suing for prospective injunctive relief, their claims are against the State Defendants in their official capacities and are governed by the Eleventh Amendment. This Court cannot consider a claim for injunctive relief for violation of § 220 of the Public Act because the Eleventh Amendment prohibits federal courts from enjoining state officials for violations of state law. *Pennhurst State School and Hosp. v. Halderman,* 465 U.S. 89, 106, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). *See also Freeman*

v. Michigan Dept. of State, 808 F.2d 1174, 1179-80 (6th Cir.1987).

Even if a state law claim for damages had been properly pled, the Court declines to exercise supplement jurisdiction over the damages claim because the Court has dismissed all of the federal claims over which it had original jurisdiction. 28 U.S.C. § 1367(c)(3). *See also Musson Theatrical, Inc. v. Federal Express Corp.,* 89 F.3d 1244, 1254-55 (6th Cir.1996) (noting that when all federal claims are dismissed before trial, the balance of considerations usually will point to dismissing the state law claims).

IX.

All of Plaintiffs' claims are rooted in their assertion that any youth who go to Teen Ranch are there as a matter of private choice, that there is accordingly no direct funding of Teen Ranch's religious practices by the State, and that the State is accordingly prohibited by the Public Act from conditioning its funding of Teen Ranch on the modification or elimination of Teen Ranch's practice and expression of its religious beliefs. Because this Court has determined that the ability to opt out of placement at Teen Ranch is not sufficient to constitute private choice, the Court concludes that the State is entitled to a judgment that its moratorium against further placements at Teen Ranch does not violate any of Teen Ranch's constitutional rights. The Court will accordingly grant the State Defendants' motion for summary

judgment, deny Teen Ranch's cross-motion for summary judgment, and enter a judgment in favor of the State Defendants.

An order and judgment consistent with this opinion will be entered.

ORDER

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Defendants' motion for summary judgment (Docket # 70) is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff's motion for summary judgment (Docket # 72) is **DENIED**.

IT IS FURTHER ORDERED that **JUDGMENT** is entered in favor of Defendants and Plaintiffs' complaint is **DISMISSED** in its entirety.

No. 05-2371

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TEEN RANCH, INC., ET AL.,

Plaintiffs-Appellants,

v.

MARIANNE UDOW, ET AL.,

Defendants-Appellees.

ORDER

(Filed Jun. 15, 2007)

BEFORE: KEITH and COLE, Circuit Judges; and STEEH,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

* Hon. George C. Steeh, United States District Judge for the Eastern District of Michigan, sitting by designation.

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

[Omitted In Printing]

[LOGO] Alliance Defense Fund.

January 21, 2004
Via Facsimile and Federal Express

Debora Buchanan, Manager
Purchased Care Division
Family Independence Agency
236 South Grand Avenue
Lansing, Michigan 48909

Re: Teen Ranch, Inc. – moratorium on placements

Dear Ms. Buchanan:

I represent Teen Ranch, Inc. and write today in response to your letter of January 9, 2004 to Teen Ranch Chief Executive Officer Matt Koch. The purpose of this letter is to assure you that the moratorium on new placements with Teen Ranch may – indeed, must – be promptly lifted.

By way of introduction, the Alliance Defense Fund is a national non-profit public interest law and educational organization that defends religious liberty. We seek to resolve disputes through education of public officials about the constitutional rights of organizations such as Teen Ranch. When necessary, we may litigate to secure those rights.

Certainly, a swift, informal resolution offers benefits to both Teen Ranch and the Family Independence Agency ("FIA"). On one hand, Teen Ranch is suffering serious economic impact and disruption of

its daily routines due to the moratorium. Meanwhile, FIA is deprived of one of its historically most effective providers, further complicating its challenging mission. Most importantly, children who would benefit from the love, care, and proven techniques of Teen Ranch are being denied what is perhaps their best chance for a productive, happy future.

Below I summarize the facts that have led to this impasse, discuss the matter, and recommend a solution.

BACKGROUND

Teen Ranch, Inc. has provided fully licensed, state-approved placement facilities for delinquent, neglected, abused, and emotionally troubled youth since 1966. Its mission is clear: "Providing hope to young people and families through life changing relationships and experiences from a Christian perspective." Its success is equally clear; it has enjoyed a remarkably low historical recidivism rate, and anecdotal evidence confirms the statistics. Simply put, a troubled teen is very likely to find a better future through Teen Ranch.

In October, 2003, FIA personnel conducted a routine "Quality Assurance Review" which included a site visit to Teen Ranch facilities that was documented in the December 2, 2003 "Quality Assurance Program Review Report ("QAP Report"). This rigorous inspection identified a handful of minor discrepancies, most of which were resolved after Teen Ranch

prepared its December 17, 2003 "Corrective Action Plan" ("Dec. 17 CAP"). The December 17, 2003 CAP was slightly amended on or about December 29, 2003 ("Dec. 29 CAP"), to further clarify a few responses and ensure that FIA's concerns were fully met. As amended, the CAP would resolve every operational issue raised by FIA, except one.

The remaining issue, according to your January 9, 2004 letter, is that "information suggest[s] that Teen Ranch may be . . . improperly incorporating religious teaching into the daily activities and treatment plans of youth." Thus, relying upon the suggestion of a possibility that religion is misused at Teen Ranch, FIA has refused to lift the moratorium lest the so-called "wall of separation" between church and state be breached.

DISCUSSION

Lifting the moratorium immediately is appropriate because (I) several of the factual allegations attributed to unnamed, troubled adolescents are addressed by existing Teen Ranch policies; (II) even assuming that there is a legitimate Establishment Clause concern, it would be resolved if FIA discharged its statutory duty pursuant to Michigan Public Act 172 § 220(2); and (III) perpetuating the moratorium would violate, *inter alia*, the First Amendment to the United States Constitution. I address each issue below.

I. SEVERAL FACTUAL ALLEGATIONS ARE ADDRESSED BY LONGSTANDING TEEN RANCH POLICY.

Several of the allegations made against Teen Ranch are issues that are properly resolved under existing Teen Ranch policies. We respectfully note that these allegations are singularly vague – there are no specifics as to which youth were purportedly required to participate in religious exercises, which staff persons were involved, when the situations happened, or where the events occurred. In most instances, the vague allegations prevent Teen Ranch from conducting its own review to determine whether its policies were violated and taking corrective action. Basing a moratorium upon such vague allegations suggests an intent to harm Teen Ranch, rather than resolve any legitimate concerns involving the youth.

We turn now to the first allegations raised in your January 9, 2004 letter.

- **Allegation**: "Seven youths reported being required to participate in religious services."

  - **Response**: Teen Ranch, as a matter of policy, does not require residents to participate in religious services: *See* Dec. 17 CAP at 8 ("Teen Ranch, as policy, does not 'force' youth to attend religious services. . . . "). Note that FIA's own review rebuts this allegation. *See* QAP Report at 12 ¶ H (youth – who first complained he had "no choice" but to attend Sunday religious services – later admitted

that "youth who don't want to go are dropped off at another house.").

- **Allegation**: Three youths reported that they would "lose points" if they did not attend and participate in church services.

  - **Response**: Teen Ranch's point system offers rewards to the youth based upon the youth's attitude and behavior each day, whether in class, working, studying, or if the youth so chooses, while at church. In other words, there is no "church exception" to the point system, whereby a youth could earn points for good behavior in school, but misbehave in church without suffering some consequence. However, points are *not* awarded as a result of the youth choosing to (or not to) attend church. *See* Tab A (2002 points policy ¶6) (points awarded for behavior in social situations *or* work/chores *or* church); Tab B (2003 point policy) (describing categories more generally).

- **Allegation**: One youth reported that she was placed "out of program" and required to do "criteria" because she did not participate in religious services.

  - **Response**: As stated above Teen Ranch does not require participation in religious services, and does not punish youth who do not participate in religious services. As with each of these complaints, further evaluation is impossible without some specifics being offered.

- **Allegation**: A female ward allegedly complained that she had been forced to attend church, where "they spoke in tongues and touch you on the forehead:"

  - **Response**: As stated above, Teen Ranch does not require youth to attend church services. We are informed that the girl was not taken to the church in question against her will, nor was she compelled to present herself to the minister. In short, according to our information, nothing involuntary occurred. This is in keeping with Teen Ranch's clear policy, as well as FIA's own report confirming that youth may choose to not attend church. If they do choose to attend church, they have a choice of religious facilities – including even the transport of an Islamic youth to worship at a mosque. Teen Ranch maintains transport records and can document its practices. Finally, even assuming that the girl found the particular mode of worship objectionable, her remedy was to choose another church or simply not go – not to have the state impose a moratorium on further referrals.

In each of these instances, FIA has relied upon the word of troubled youth over the plainly stated policies of Teen Ranch. We do not suggest that youths' complaints should not be taken seriously. Rather, FIA should obtain verifiable details and give sufficient information to allow Teen Ranch to discern and correct any lapses in its procedures. Put another way, the allegations (at most) may merit an internal

review by Teen Ranch. *They certainly do not support a state-imposed, religiously discriminatory moratorium upon the organization.*

II. ESTABLISHMENT CLAUSE CONCERNS ARE READILY RESOLVED IF FIA DISCHARGES ITS STATUTORY DUTY UNDER STATE AND FEDERAL LAW.

The remaining allegations flow from "The River," which is one program used at Teen Ranch to help youth overcome the daunting difficulties in their lives. According to FIA, this River breaches the so-called "separation of church and state" because it has religious content and is used as part of Teen Ranch's treatment plans. This concern is driven less by facts and more by misreading the law.

A. THE REMAINING FACTUAL ISSUE IS IRRELEVANT.

The only factual issue was that one girl complained that she was required to attend the program – but not because it offended her religious sensibilities. Rather, she complained that The River "was geared toward girls that had been sexually abused and since she wasn't, she didn't think it was necessary for her to attend." QAP Report at 12 ¶ H. Her only other comment was that the program directors would not excuse girls during the program to use the bathroom – although they were warned of this and given time to do so beforehand. *Id.* This complaint

has nothing whatsoever to do with Teen Ranch's policies regarding religion, and certainly does not implicate the Establishment Clause. Rather, it pertains to her course of treatment, which cannot be evaluated because FIA did not provide specifics that would allow Teen Ranch to evaluate whether The River was appropriate for the complaining youth. If FIA will provide that information, her treatment plan will be reviewed and any appropriate adjustments will be made.

B. THE LAW PROHIBITS ONLY DIRECT STATE FUNDING OF RELIGIOUS ACTIVITIES, NOT THE ACTIVITIES THEMSELVES.

FIA summarizes the relevant law by saying that "providers receiving federal funding may not incorporate sectarian worship, instruction, or proselytization into the daily treatment and service plan activities." In support of this position, FIA cites Michigan Public Act 172 § 220(1):

> In contracting with faith-based organizations for mentoring or supportive services, and in all contracts for services, *the department shall ensure that no funds provided directly to institutions or organizations to provide services and administer programs shall be used or expended for any sectarian activity, including sectarian worship, instruction, or proselytization.*

Id. (emphasis added).

There is a basic error with FIA's reading of the law: what the statute prohibits is direct *state funding* of the specified religious activities, not the religious activities themselves. In our case, The River is planned and implemented by a privately-paid staff chaplain and is not directly supported by any state funds.

Not only has FIA misread the relevant law, it completely ignored the next subsection of P.A. 172:

> If an individual requests the service and has an objection to the religious character of the institution or organization from which the individual receives or would receive services or assistance, the department shall provide the individual within a reasonable time after the date of the objection with assistance or services and which are substantially the same as the service the individual would have received from the organization.

Id. § 202(2); *see also* 42 U.S.C. 604a(e) (same statutory obligation for state agencies receiving federal TANF funds).

Simply put, state law protects the youth who are processed through FIA from exposure to unwanted religious content by requiring *your* agency to respond to such objections with alternative, non-objectionable options. Therefore, *if* any of the thin allegations cited by FIA had any merit whatsoever, it was (and is) FIA's statutory duty to provide options. Teen Ranch is perfectly willing to fully cooperate in relocating any objecting youth who might seek relocation under

§ 202(2). The law certainly does not demand that Teen Ranch secularize itself and its programs as a condition of equal access to government funds.

Recent case law affirms this understanding. *See Freedom from Religion Foundation, Inc. v. McCallum*, 324 F.3d 880 (7th Cir. 2003). The facts in our case strongly parallel those of *McCallum*. In both cases, the prospective residents are under state control; the state evaluates the prospective resident and decides which program best suits the person's needs; and the state directs the person to a private program under contract to the state. Importantly. both cases involve faith-based providers that include significant religious components in their treatment. The only significant difference is that in *McCallum*, the state ensured that objectors were offered an alternative. In our case, FIA has not discharged that legal duty.

The proper resolution of this matter should now be clear: FIA should promptly implement an "opt out" process for youth that it directs to residential care facilities. Teen Ranch would readily support FIA's effort by ensuring that the program descriptions are accurate, and establishing a procedure to report objections from youth who change their minds after beginning the Teen Ranch program.

Just as the current moratorium has had very serious effects on FIA, Teen Ranch, and the many youth that could have been served by Teen Ranch, so this solution would offer many benefits: FIA would regain one of its best contractors and be assured that

its process is constitutional under Establishment Clause law; Teen Ranch could resume its service to the state; and the youth who so desperately need Teen Ranch's wisdom and love could receive it.

III. PERPETUATING THE MORATORIUM PLACES FIA IN AN UTTERLY UNTENABLE LEGAL POSITION.

For some three decades, the Ranch has received state funds under religion-neutral criteria, without any Establishment Clause issues arising. FIA's moratorium, on the other hand, targets religion for disfavored treatment and violates a multitude of constitutional principles. The question created by the moratorium is whether the government may single out and discriminate against a religious program in the course of distributing government thuds to serve its valid, secular public interests. Under statutory and well-settled case law, the answer is "no."

First, express discrimination against religious speech and practice violates the basic free exercise rule set forth in *Church of the Lukumi Babalu Aye, Inc. v. City of Fialeah*, 508 U.S. 520 (1993). If a law "infringe[s] upon or restricts practices because of their religious motivation," the law is valid only if it is narrowly tailored to advance a compelling state interest. *Id.* at 533. As well, conditioning benefits in this way violates the rule in *McDaniel v. Paty*, 435 U.S. 618 (1975). Free speech rights under the First Amendment are also violated, because the funds

constitute a type of free speech forum. Barring Teen Ranch's participation, solely because it treats youth from its Christian perspective, is viewpoint discrimination that is blatantly unconstitutional under *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) and its progeny. This doctrine is implicitly recognized in 42 U.S.C. §§ 604a(b)-(d), which prohibits state agencies from tinkering with the religious nature of faith-based organizations.

The religious restriction also violates the Equal Protection Clause, because all other care providers have full access to state funding, while a religiously motivated program is denied funding for one reason: its religious nature. Similarly, the moratorium was imposed apparently by the exercise of raw, unbridled official discretion. This violates the federal Due Process Cause, which proscribes *ad hoc* enforcement of government regulations.

As demonstrated by *McCallum*, the Establishment Clause concern is without merit and would not justify FIA's continued religious discrimination. Nor does it matter that the state constitution contains an "Establishment Clause" provision. Rather, Teen Ranch's federal constitutional claims would, as a matter of law, prevail over any state Establishment Clause concerns in this instance. *See* U.S. Const. art. VI, cl.2 (Supremacy Clause); *see also, Widmar v. Vincent*, 454 U.S. 263, 276 (1981). Note, too, that state free exercise and establishment claims are interpreted in the same way as federal law. *See*

generally, Daugh[illegible] v. Vanguard Charter Sch. Academy, 116 F. Supp. 2d 897 (W.D. Mich. 2000). Thus, FIA may not take refuge in some supposed "higher wall" of separation arising from state law theories.

Simply put, FIA's imposition of the moratorium discriminates on the basis of the religious nature and beliefs of Teen Ranch, and leaves your agency in a very precarious legal situation. The moratorium is a draconian response to minor operational issues, and completely fails to redress the real problem: FIA's failure to provide the proper opt-out procedure.

CONCLUSION

In light of the above, it is appropriate (if not imperative) that the moratorium be promptly rescinded, and it is our strong hope that this letter may attain that result in an informal, cooperative manner. Similarly, in light of the state and federal law regulating the relevant funds, FIA must provide an "opt out" procedure. Again, Teen Ranch will lend its expertise and cooperation in developing that procedure so that every youth coming to the ranch does so via a fully informed private decision. Taking such action would fully resolve any legitimate Establishment Clause concerns in this case.

At the same time, if FIA has additional information which suggests that there was any lapse in the application of Teen Ranch's policies, Teen Ranch will promptly act on that information when it is provided, remedy the problem, and document it via a CAP.

Such a resolution is far preferable to litigation. Nonetheless, if informal resolution cannot be achieved, I am obligated to inform Teen Ranch of its right to seek redress in federal court.

It is of the utmost import that the moratorium be promptly rescinded. Please advise me of your position in this matter no later than January 30, 2004.

Of course, please feel free to contact me if I may assist in informally resolving this matter.

Sincerely,

/s/ Gary S. McCaleb
Gary S. McCaleb
Senior Counsel

cc: Fax only, w/o attachments:
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

TEEN RANCH, INC., et al., CASE NO. 504-CV-0032

Plaintiffs, HON. ROBERT HOLMES BELL

vs.

MARIANNE UDOW, et al.,

DEPOSITION OF:
DEBORA BUCHANAN
December 10, 2004
235 South Grand
Lansing, Michigan

Appearances – JOEL L. OSTER, ESQ.
and
MARK P. BUCCHI, P-32047
Attorneys for Plaintiffs
JOEL D. McGORMLEY, P-60211
Assistant Attorney General
Attorney for Defendants

Also Present – Matthew Koch
Mitchell Koster

Recorded by: – NETWORK REPORTING CORPORATION
Rebecca A. Alexander, CER-4233

* * *

[74] MR. McGORMLEY: Same objection; calls for a legal conclusion.

A Well, I recognize that the first sentence says: "The department shall follow guidelines." I don't know what those guidelines are. I don't have them in front of me. I don't know that we're not following those guidelines. I don't know that one – section 1 trumps section 4 or vice versa.

Q All right. Before we break for lunch, I want to be absolutely clear that I understand that – if I correctly understand your testimony that your concern then and now is that money go from the State to Teen Ranch to pay for any of the religious programming regardless of whether or not that programming is voluntarily participated in by the wards?

A My position right now today is that it is improper for the State of Michigan to contract with a provider who incorporates religious beliefs, practices, et cetera, into their daily treatment and ongoing care for youth.

Q And my – the gist of my question, though, was is that your position regardless of whether or not the wards are participating voluntarily?

A If FIA is funding those positions and if FIA state and federal dollars are going towards that, then, yes, I agree that having it incorporated into treatment and ongoing [75] activities would be improper.

Q And I want to get down to the precise point that I'm trying to be clear on with you. Does your

answer stay the same whether or not the youth that are participating are doing so voluntarily?

A My position would be the same whether they're voluntary or not if state and federal dollars are being used for –

MR. BUCCHI: Let's have lunch, and we'll see you in an hour. That was the pre-agreed time, and we got awful close to it.

MR. McGORMLEY: Sure. Do you want to go 1:10?

MR. BUCCHI: Absolutely. And as you well know, Counsel, as a man of experience, 1:10 is going to be a very flexible concept.

(Off the record)

Q Ms. Buchanan, you've indicated that in the course of your involvement in this matter, you consulted with any number of your colleagues at the FIA; correct?

A Yes, sir.

Q Would that include Musette Michael?

A Yes, sir.

Q And would it include Mrs. Udow?

A I have not spoken with Mrs. Udow regarding this matter.

Q Okay. What about Ms. Slottke?

A I'm sure I had conversations with Carol Slottke regarding [76] the Teen Ranch and the moratorium. I did not consult with her regarding the letters that I wrote or any of those things.

Q You expressed the opinion just before we broke for lunch that regardless of the voluntary nature of the participation of the wards that if religion was being dispensed as a part of the program, then that would be objectionable; right?

A I can't remember exactly what I said, but this is what I think is that it is both the – it is both the inclusion of religious teachings, practices, et cetera, and treatment planning and ongoing daily activities, and if there were a situation where kids were being forced to participate, that would be equally of concern.

Q But whether or not the children were being forced, it was of concern. That's what you said just before lunch; right?

A Yes.

Q Okay. Did anybody that you spoke to at the FIA since last November of 2003 disagree with you in this respect?

A No. I don't – if anybody disagreed, I don't recall it.

Q Now, to your knowledge, what form of religious content was being dispensed to the wards of Teen Ranch to which you objected?

A To my knowledge, what was being dispensed was Christian teaching to youth in the course of their daily activities [77] and in the course of providing treatment to the youth such as –

Q Give me an example.

A – The River.

Q What about – what was happening at The River to which you objected?

A Based on reviewing the statement made by a youth in the questionnaires that you have as well as reviewing information that was provided or available from Teen Ranch, it appeared to me that The River was designed to promote, encourage youth to participate in Christian teachings.

Q Did it every come to your attention that any of these youth were receiving any sort of vocational training in any Christian denomination, i.e., being taught to be preachers?

MR. McGORMELY: I'm going to object as too vague. Is this relating to specifically –

MR. BUCCHI: At Teen Ranch.

MR. McGORMELY: – in this time frame?

MR. BUCCHI: Well, let's start with since 2003, yeah.

MR. McGORMELY: Okay.

A Did I understand the question to be was I aware that any youth placed at Teen Ranch since 2003 were being educated to become preachers?

Q Yeah, at Teen Ranch.

A FIA State-supervised youth?

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